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In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

BRIEF FOR RESPONDENT STATE OF IDAHO

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QUESTION PRESENTED

The question presented is whether the McCarran Amendment, 43 U.S.C. § 666(a), waives the United States' right to plead immunity from Idaho's general stream adjudication procedures, including payment of filing fees for special services rendered by the Idaho Department of Water Resources and judiciary to all claimants.

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OPINIONS BELOW

Petitioner's Appendix (Pet. App.) fully sets forth the opinions below.

STATUTES INVOLVED

The principal statutory provisions, 43 U.S.C. § 666 and Idaho Code § 42-1414, are fully set forth in the Brief for the United States. The Idaho water rights adjudication statute, ch. 14, title 42, Idaho Code, is set forth in the appendix to Idaho's Brief in Opposition to Petition for Certiorari.

STATEMENT OF THE CASE

The Snake River is one of the great rivers of the western United States. It rises along the continental divide near Yellowstone and Grand Teton National Parks in Wyoming, and travels across southern Idaho in a broad crescent. Along the way it joins with such rivers as the Henry's Fork, internationally known for its fly fishing, the Blackfoot River, the Big Wood River, the Bruneau River, the Boise River and the Payette River. At the western boundary of Idaho, the Snake enters Oregon for a short time and turns north. The river then becomes the boundary between Idaho and the states of Oregon and Washington while passing through the nation's deepest gorge, Hells Canyon. Along the way the Salmon River, the fabled "River of No Return" of the Lewis and Clark expedition, drains into the Snake out of the huge wilderness of central Idaho. Further north, the Clearwater River leaves the continental divide at the top of the Bitterroot

Mountains and joins the Snake River near Lewiston, where the Snake leaves Idaho. In all, the Snake River Basin includes eighty-seven percent of the State of Idaho. Tr. 947.

The Snake River and its tributaries[1] provide the only water for most of Idaho. The water is used for irrigation, not only on farms in the Snake River Plain in southern Idaho, but also for all the farms in valleys tucked throughout the Basin. The water provides flows for white water rafting and trout fishing for visitors from around the world. Cities, factories and fish farms all obtain their water from the Snake River and its tributaries. Every need for water on approximately 72,694 square miles of land must be satisfied with water that is part of the Snake River Basin.[2] Over 64% of this area is owned by the United States. Tr. 948.

The Snake River Basin Adjudication [SRBA], from which this case arises, was initiated in 1987. Contrary to the United States' assertion that the Swan Falls settlement was the genesis of the SRBA, the recommendation to initiate the SRBA came from a committee appointed by the governor of the State of Idaho, called the Snake River Technical Advisory Committee. Tr. 863-65. The Committee included representatives of the United States Department of Interior Bureau of Reclamation and the United States Geological Survey. Tr. 1119-1122; 1127-1128. All parties to the committee agreed that an adjudication was

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[1] The Snake River's tributaries include the ground water aquifers in the Snake River Basin.

[2] The total area of the State of Idaho is 83,557 square miles. Idaho Exh. No. 232 at 5. Eighty-seven percent of this total is 72,694 square miles.

necessary in order to effectively manage the water of the Snake River Basin. Tr. at 1127. After the 1983 Technical Advisory Committee Report was issued, the State of Idaho and Idaho Power Company began negotiations that led to the Swan Falls settlement, which resolved a dispute over the company's water rights. The settlement agreement accepted the technical advisory committee's recommendation to commence a general adjudication of the Snake River Basin. Tr. 902-04.

The size and complexity of water rights adjudications set them apart from other types of proceedings. This is especially true for the SRBA. Over 90,000 non-federal claims have been filed in the SRBA and federal claims will exceed 30,000. Tr. 952; R. 248, 253-55, 261, 272, 279, 285, 505. The difficulty of adjudicating over 120,000 water rights spread over 72,000 square miles of diverse terrain cannot be overstated. Each of these 120,000 claims has the potential for being an individual suit determining whether the claim is valid. In order to address this daunting task, Idaho developed an adjudication procedure that is a combination of administrative and judicial procedures, very similar to the systems in other western states.[3] The process adopted by Idaho centralizes planning

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[3] In the western states four different general water rights adjudication systems have been adopted, the Colorado, Wyoming, Oregon and Bien Code systems. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 452-59 (U.S. Dep't of Agriculture, Misc. Pub. No. 1206, 1974). All of these systems contemplate a large administrative component except for the Colorado system. *Id. See, generally,* C. Peter Goplerud III, *Adjudication of Water Rights,* in 2 WATERS AND WATER RIGHTS, ch. 15 (Robert E. Beck ed., 1991); Edward W. Clyde, *General Adjudication Proceedings,* in 6 WATERS AND WATERS RIGHTS, ch. 29 (Robert

and fact-finding in an administrative agency, with ongoing court oversight.

The responsibility for the administrative portions of the SRBA is vested in the Director of the Idaho Department of Water Resources [IDWR]. The IDWR was required by statute to petition the district court to commence the SRBA. Idaho Code §§ 42-1406A; 42-1408 (1990).

Upon the district court's determination of the scope of the adjudication, the IDWR served notice of the commencement upon the 450,000 owners of real property within the boundaries of the adjudication. Tr. 952. This required a search of, among other records, county tax records and state water rights records. Idaho Code § 42-1408A (Supp. 1992); Tr. 952-53. Special studies to review service were performed to ensure that all claimants received proper notice. Tr. 957-959. The notice was also published in newspapers around the state, and posted in all the county courthouses, recorders' offices, and assessors' offices within the Snake River Basin in Idaho. Idaho Code § 42-1408A(2) (1990). The special procedures regarding service ensure that the final decree in the SRBA will be binding on all persons. Idaho Code § 42-1420 (1990).

As part of the service of notice, the IDWR supplied a notice of claim form prepared by the IDWR to each claimant. Idaho Code § 42-1409 (1990). The IDWR also made maps and other information available to claimants to assist in preparing their notices of claim. Idaho Code § 42-1410(4) (1990).

Clark ed., 1972); A. Dan Tarlock, Law of Water Rights and Resources, ch. 7 (1992).

Each of the over 120,000 claims will be reviewed to verify that it provides the necessary information. When requested, the IDWR provides assistance to claimants to ensure that their notice of claim contains all the necessary information. Tr. 953. Each claim is then processed by adding new information from the claim into the IDWR's existing computer database. Tr. 656.

After reviewing and processing the claims, the IDWR is directed to examine the water system and uses of water, "for such a period of time as is necessary to evaluate the extent and nature of each water right for which a notice of claim has been filed." Idaho Code § 42-1410 (1990). This is no simple matter. The IDWR compares the notices of claim with existing water right records such as prior adjudication decrees, licenses, permits, and approved applications for changes in use. U.S. Exh. 3006, at 4. Many water rights in Idaho were obtained and continue to be defined simply by the "use" that is being made of the water. *Nielson v. Parker*, 19 Idaho 727, 733, 115 P. 488, 490 (1911) (surface water rights); *Silkey v. Tiegs*, 51 Idaho 344, 353, 5 P.2d 1049, 1053 (1931) (ground water rights).[4] The only way to determine the nature of these claimed water rights is by examining actual water use, investigating its history, and determining how that water use interrelates to the water uses of others. Such investigations may also be necessary when discrepancies

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[4] Idaho's permit system for ground water rights was not mandatory until 1963, and was not mandatory for surface water rights until 1971. Idaho Code §§ 42-103 and 42-229 (1990).

are found between claims and existing water rights records. Investigations can include fact-finding hearings as well as field examinations. Idaho Code § 42-1410(1) (1990).

After completing its investigations, the IDWR prepares a report on the water system, including a "determination of the rights to the use of water from the water system . . . . " Idaho Code § 42-1411(1) (1990). This report is commonly referred to as the "director's report." For each water right acquired under state law, the IDWR investigates and presents recommendations regarding nine separate elements, including the priority date of the water right and the time, place, purpose, and amount of water use. Idaho Code § 42-1411(2) (1990). The Director's recommendations also include provisions regarding how water rights are to be delivered among themselves and how various water bodies such as ground water aquifers and surface tributaries are to be administered in relation to each other. Tr. 643-44, 996-98. The IDWR files a copy of the director's report with each affected county, and serves a notice of filing on each claimant, which includes the proposed recommendation of the claim. Idaho Code § 42-1411(4) (1990).

Under Idaho's adjudication laws, claimants are never required to file and serve a traditional complaint alleging their water rights or file and serve an answer to the thousands of other claims. Likewise, the notices of claim do not have to be served on all of the other water right claimants in the SRBA or filed with the district court as would be the case in typical litigation. See Idaho Code § 42-1409(6) (1990).

Rather, claims are filed solely with the IDWR, and after they are reviewed, the director files a director's

report containing a recommendation for each water right claimed under state law and an abstract of federal reserved water right claims. Parties file objections to the IDWR's recommendations as compiled in the director's report.[5] Idaho Code § 42-1412(1) (1990). The IDWR files with the district court a response to any objection made to the director's report. The IDWR attaches to that response the claimant's original claim. Idaho Code § 42-1412(2) (1990). After the period for filing objections and responses expires, hearings are held by the district court only on those water rights for which objections are filed. Idaho Code § 42-1412(7) (1990). The portions of the director's report for which no objections are filed are admitted as true facts and proceed directly to decree without the necessity of an adversarial proceeding. Idaho Code § 42-1412(9) (1990).

The massive size of the SRBA, dictated that many processes be centralized in the IDWR in order to make the adjudication manageable. The IDWR estimated at the time of the trial in this matter that it would cost $32 million to provide the adjudication services required by statute. R. 190.

A committee appointed by the governor determined that the services provided by the IDWR were of benefit primarily to the claimants in the adjudication.

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[5] Claims for federal reserved water rights may be objected to by other parties. Idaho Code § 42-1412(1) (1990). Since such rights are abstracted by the IDWR, however, the IDWR does not respond to such objections. Instead, the United States responds on its own behalf. Idaho Code § 42-1412(3) (1990).

R. 553. Thus, it was recommended that the adjudication services provided by the IDWR be financed through a filing fee that would accompany each notice of claim. R. 554. The Idaho legislature ultimately adopted such a system. Idaho Code § 42-1414 (1990). The fees go into the adjudication account, which may be used only to "pay the costs of the [IDWR] attributable to general water rights adjudications," and "judicial expenses directly related to the Snake river adjudication. . . . " Idaho Code § 42-1777 (1990).

The United States estimates its filing fees will be $10 million. Brief for the United States at 9. These fees will cover adjudication services relating to over 30,000 claims made by at least twelve different federal agencies. All told, this averages approximately $330 per claim. The fees will help secure the only water available for the 23 million acres of federal land within the boundaries of the SRBA.

Nonetheless, the United States complains in its "Statement" that the fee structure falls more heavily on governmental claimants, because governmental claimants must pay $100 per cfs[6] for instream flow claims,[7] while agricultural users pay one dollar per acre irrigated and hydropower users pay $3.50 per kilowatt of capacity. Brief for the United States at 9. The United States' suggestion that the fees "fall more heavily" on governmental claimants misstates the fee schedule. The fee of $100 per cfs applies not only to sovereign instream flow claimants,

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[6] "Cubic feet per second" is a standard measure of water flow. Idaho Code § 42-102 (1990).

[7] In Idaho, the only claimants of instream flows are the State of Idaho, the United States, and Indian tribes.

but also to private claimants using water for municipal, industrial, commercial, mining, heating, or cooling purposes. Idaho Code § 42-1414(2) (1990).

Moreover, comparing a fee based upon cubic feet per second flow of water to a fee based upon the number of irrigated acres compares apples to oranges. Instream flow rights generally are established year around, while agriculture has a shorter irrigation season. Instream flows are established along stream "reaches" which extend for miles while irrigation water use has a discrete point of diversion and place of use.

Additionally, the United States estimates that it will assert claims for over 814,000 irrigated acres and for hydropower facilities totaling 641,650 kilowatts of capacity. R. 253, 255, 258, 261, 266, 272, 275, 279, 282, 285. Thus, even if one assumes the United States is correct when it asserts fees for agriculture and hydropower are "lower," it too will benefit from such "lower" fees. Furthermore, most of the United States' claims are for domestic and stockwatering uses, which have a fixed fee of only twenty-five dollars per claim. R. 248-292.

It should also be noted that the amount of fees the United States will pay could well be overstated. The United States has not yet submitted its actual claims in the SRBA. Thus, the total number and size of claims filed by the United States could be substantially smaller than described in the affidavits cited by the United States. *See* R. 248-292. Additionally, the Idaho legislature has encouraged negotiation of federal reserved water right claims.

See, e.g., House Concurrent Resolution No. 16, 1985 Idaho Sess. Laws 745. Such negotiations have, in at least one instance, resulted in an agreement whereby the state paid the filing fees of the United States for the federal reserved water rights of the Shoshone-Bannock Indian Tribes. 1991 Idaho Sess. Laws Chap. 228, p. 547; Pub. L. 101-602, 104 Stat. 3059 (1990).

The United States also alleges that it receives no benefit from the adjudication. Brief for United States at 12-13, 35-37. As discussed more fully in Sections I.B. 1 & 2, *infra* at 29-40, there is a significant benefit to all water users in knowing the scope of their water rights. Further, the services provided by the state ensure that this benefit is obtained by streamlining the adjudication. The unbiased information and technical analysis provided by the state allow claimants to more effectively assert and protect their water right claims and review all other claims.

SUMMARY OF ARGUMENT

I.

This Court's decisions have concluded uniformly that the plain language of the McCarran Amendment, as well as the policies underlying the Amendment, require the United States, once joined in a general stream adjudication, to comply with the comprehensive procedures established by each state for the adjudication of water right claims.

> [W]e have recognized that actions seeking the allocation of water essentially involve the

> [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the *availability of comprehensive state systems for adjudication of water rights* as the means for achieving these goals.

Colorado River Water Conservation District v. United States, 424 U.S. 800, 819 (citations omitted) (emphasis added). The waiver of immunity applies even if a state adopts new and more burdensome procedures. *United States v. District Court for Water Div. No. 5*, 401 U.S. 527, 529 (1971).

In addition to conflicting with this Court's prior decisions, the United States' attempt to construe the McCarran Amendment to only waive federal sovereign immunity to state appropriation laws is not supported by the plain language of the statute. The first provision of the McCarran Amendment gives consent to join the United States in a general stream adjudication. The second provision provides that the United States is required to comply with "the State laws." The only plausible reading of this provision is to require the United States to comply with those state laws governing the conduct of suits for the adjudication and administration of water rights. The legislative history of the McCarran Amendment confirms this reading. Congress sought to preserve and protect the ability of the states to maintain the unique procedures each state had developed for the adjudication and administration of water rights. S. Rep. No. 755, 82d Cong., 1st Sess., 4-5 (1951).

Since the adjudication filing fee is a part of the comprehensive state procedures established by Idaho for the adjudication of water rights, it falls within the plain

language of the waiver of immunity found in the McCarran Amendment. The fee finances services that allow the State to centralize critical adjudication procedures, thereby facilitating the conduct of general stream adjudications. Without such centralization, the adjudication of the 120,000 water rights at issue in the SRBA would be unmanageable. Rather than having the full benefit of an independent and impartial expert, the trial court would be left to sort through the engineering testimony and exhibits of a multitude of parties. Correspondingly, claimants would incur the cost of duplicating services currently provided by the IDWR at much less expense.

II.

The only exception to the sweeping waiver of sovereign immunity in the McCarran Amendment is "That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a). The Court has recognized that the "proper objective" when construing exceptions to a broad waiver of immunity "is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984); *United States v. Nordic Village, Inc.*, 112 U.S. 1011, 1014 (1992).

A "judgment for costs" serves to reimburse prevailing litigants for the expenses incurred in asserting their rights. The filing fees at issue in this case are required by law to be used to finance centralized, quasi-judicial services that facilitate the conduct of the adjudication and are for the benefit of the claimants as a whole. The Director is neither a claimant nor a prevailing party, but rather an independent fact finder. Further, the fees are assessed equally upon all parties by statute, not imposed

by the court on the losing party. Thus, the fees fall outside the plain meaning of the "judgment for costs" exception.

ARGUMENT

I. THE MCCARRAN AMENDMENT WAIVES THE UNITED STATES' RIGHT TO PLEAD IMMUNITY FROM STATE ADJUDICATION PROCEDURES, SUCH AS IDAHO'S FILING FEES.

The McCarran Amendment waives the United States' sovereign immunity from participating in state water rights adjudications with simple, sweeping language:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a). A thoughtful examination of this statutory provision and the Court's previous decisions construing it reveal that Idaho's filing fee is a common element of state water rights adjudication laws and falls squarely within the McCarran Amendment waiver of sovereign immunity.

A. The Supreme Court Has Interpreted The McCarran Amendment As A Sweeping Waiver Of The United States' Right To Plead Immunity From State Water Rights Adjudication Laws.

The United States concedes, as it must, that the McCarran Amendment waives its immunity; however, the United States argues the waiver is limited to "substantive state laws governing the acqui[sition of] water rights by appropriation," not state laws governing adjudications. Brief for United States at 24-25. It asserts this interpretation is required by the rule of strict construction of waivers of sovereign immunity. The United States' argument to limit the scope of the waiver ignores, however, this Court's decisions construing the McCarran Amendment as a sweeping waiver of the United States' sovereign immunity to comprehensive state systems for adjudication of water rights.[8]

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[8] A central canon of judicial decision-making is that the courts will apply the law consistently and, under the doctrine of *stare decisis*, will stand on principles of law determined in their previous decisions. For instance, when considering the preemptive effect of the Federal Power Act of 1935, 43 U.S.C. § 383, the Court noted:

> Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. ___, ___, 109 S. Ct. 2363, 2370, 105 L.Ed.2d 132 (1989).

California v. Federal Energy Regulatory Commission, 495 U.S. 490, 499 (1990).

Rather than relying on generalized canons of statutory construction, the Court's analysis of the McCarran Amendment has focused on the unique nature of the statute.

> [W]ater rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983). In the context of the McCarran Amendment, as with other "sweeping" waivers of sovereign immunity, the Court has paid special attention to the Congressional policy underlying the language of the Amendment.

The principle that has guided the Court in its interpretation of the McCarran Amendment is that all water right claimants, including the United States, must be subject to state general stream adjudication laws. *See, e.g., Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11, 819 (1976). The United States, however, has consistently attempted to limit its participation in state general water rights adjudications by arguing the Amendment is ambiguous and, as a result, strict rules of construction should be applied to narrow the scope of the waiver. This Court has uniformly rejected these attempts.

In *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), the Court held that the McCarran Amendment permitted the adjudication of reserved

rights of the United States in state court. The Court relied on statements of Senator McCarran in the legislative history of the Amendment to reject the United States' "extremely technical" argument that the Colorado suit was a supplemental proceeding, and therefore was not a general adjudication. *Id.* at 525.[9]

In *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971), the companion case to *District Court for Eagle County, supra*, the Court again rejected the narrow construction argument of the United States. The United States argued that the procedures under the new Colorado Water Right Determination and Administration Act of 1969 were "much more burdensome on the Government than they were under the older Act." *Id.* at 529. The new statute contemplated monthly proceedings before a water referee on water rights applications, and the only water rights considered in the proceeding were those for which an application had been filed within a particular month. *Id.* Nonetheless, the Court upheld application of these new, more burdensome, procedures to the United States because the Colorado suit was a "general adjudication" as required by the McCarran Amendment's consent-to-be-sued provision. *Id.; cf. Dugan*

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[9] The Court rejected the United States' alternative reading of the phrase "water rights by appropriation under State Law, by purchase, by exchange, or otherwise," as referring only to rights obtained pursuant to state law. 401 U.S. at 524. The Court construed the scope of the waiver broadly to include appropriative rights, riparian rights and reserved rights because the McCarran Amendment is an "all inclusive statute." *Id.* This construction of the McCarran Amendment demonstrates that the Court has not resorted to the methods of strict construction applied by the Court in the context of less sweeping waivers. *See Department of Energy v. Ohio*, 112 S.Ct. 1627 (1992).

v. Rank, 372 U.S. 609, 618 (1963) (private suit to determine water rights not a general stream adjudication).

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the United States argued that state court jurisdiction over Indian reserved rights should not be recognized, unless expressly conferred by Congress. *Id.* at 812. The Court rejected this argument and held, based upon not only the Amendment's language but also its underlying policy and legislative history, that state courts have jurisdiction over Indian reserved rights under the Amendment. *Id.* at 809-814. The Court went on to uphold the dismissal of the concurrent federal district court action in favor of the state court proceedings. The Court stated that the "clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Id.* at 819. The Court went on to state:

> [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the *availability of comprehensive state systems for adjudication of water rights* as the means for achieving these goals.

Id. at 819 (citations omitted) (emphasis added).

In *San Carlos Apache Tribe*, the sequel to *Colorado River Water Conservation District*, the Court re-emphasized the importance to its previous decision of the states' adjudication procedures:

> In the case at hand [*Colorado River Water Conservation District*], we noted the comprehensive nature of the state proceedings and the considerable expertise and technical resources available in those proceedings.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 552 (1983).[10]

The United States' reliance on the rule of strict construction of waivers of sovereign immunity cannot be reconciled with the method of analysis the Court has used in the prior McCarran Amendment cases. A common thread in each of these cases is the consistent holding that the McCarran Amendment embodies the congressional policy of encouraging states to apply their expertise and adjudication procedures to the United States' water rights. Indeed, in *Water Division No. 5* this Court specifically rejected the United States' argument that the McCarran Amendment did not waive federal immunity to Colorado's state adjudication procedures. Likewise, as shown below, the McCarran Amendment waives the United States' immunity to Idaho's adjudication procedure, including payment of the statutory filing fee.

B. The Plain Language Of The McCarran Amendment And Its Legislative History Require That The United States Comply With State Laws Governing The Conduct Of General Stream Adjudications.

The structure of the McCarran Amendment is plain and uncomplicated. The first sentence provides the terms pursuant to which the United States consents to joinder. *See District Court for Eagle County*, 401 U.S. at 523-24. The second sentence, in plain language, waives the United States' sovereign immunity from the application of the

[10] In a later passage, the Court noted the "administrative machinery available to the state courts" as a reason to defer to state proceedings. 463 U.S. at 570.

state laws pursuant to which adjudications are conducted:

> The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

43 U.S.C. § 666(a).[11] As discussed above, this Court has construed this plain language to require the United States, once joined in a general stream adjudication, to comply with state laws governing the conduct of the adjudication even when new and more burdensome procedures are adopted. *District Court for Water Division No. 5, supra.*

The Court has treated the broad language of the McCarran Amendment similarly to the "sue or be sued" clauses associated with federal governmental corporations. *See Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984) (and cases cited therein); *Ardestani v. Immigration and Naturalization Service*, 112 S.Ct. 515, 520 (1991) ("[W]e have recognized that once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to

[11] This is the only sentence in the McCarran Amendment which explicitly approves of application of *state* laws to the United States. Thus, it must be read together with the first sentence which does not explicitly mention suits in state courts. This point was made in Idaho's Brief in Opposition to Certiorari at 15. The United States selectively edits a quote from that Brief to improperly suggest that Idaho recognizes that the first sentence is a limited waiver of immunity to state court jurisdiction. This misquote is used to support the United States' tortured argument that the clear waiver in the second sentence relates to laws regarding acquisition of water rights, not adjudication of those rights. Brief for the United States at 19.

'assume the authority to narrow the waiver that Congress intended . . . . ' "). The broad construction of "sue and be sued" clauses results from the view that when Congress "authorizes [a governmental agency] to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' " those governmental agencies will be "treated similarly to other self-sustaining commercial ventures." *Franchise Tax Board of California*, 467 U.S. at 517, 525.

Similarly, when the federal government quantifies its water rights, whether based upon federal or state law, those rights are being integrated with a property regime of highly interdependent rights, where the nature of a water right cannot be known until all the others around it are defined.[12] The integrity of this system of interlocking rights depends upon a single adjudicative system defining the interrelationship between all rights:

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[12]Water rights created by the appropriation doctrine might be analogized to a jigsaw puzzle in which each piece represents a water right. The area of a piece represents the diversionary entitlement, and the shape presents other variables which affect stream flows. These variables include the amount and timing of return flows, the place at which they enter the stream, the frequency and the seasonal patterns of diversion, and the point of diversion. The first appropriator is free to carve out a piece of any size and shape. Each subsequent appropriator is also free to determine the size and shape of his piece, except that it cannot encroach on the pieces carved out by prior appropriators. As this process progresses, the pieces or rights become a tightly interlocking pastiche.

George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND AND WATER L. REV. 1, 12 (1988).

> The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent.

Colorado River Water Conservation District, 424 U.S. at 819. Thus, in general adjudications, where all water rights on a river system are to be defined, this Court has determined that the McCarran Amendment allows the United States to "sue or be sued" like any other water right holder. This is exactly what Congress had in mind with the McCarran Amendment:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees

> and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951); cited in *Colorado River Water Conservation District*, 424 U.S. at 810-811.

The United States cannot deny there is a waiver of immunity to the state laws in the second sentence of the Amendment, and therefore labors to limit the waiver to only one aspect of state water laws. The United States asks this Court to apply rules of statutory construction in an extremely convoluted manner, in order to conclude that the McCarran Amendment waives immunity only to "the body of substantive state laws governing 'acqui[sition of] water rights by appropriation.' " Brief for the United States at 24, quoting 43 U.S.C. § 666(a) (modification in original).

The United States bases its argument on the fact that there are two references to state laws in the McCarran Amendment: a reference to "State law" in the first sentence, which describes one of the types of water rights amenable to adjudication, and a reference to "the State laws" in the second sentence, which describes the laws that are applicable to the United States:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under *State law*, by purchase, by exchange, or otherwise, and the United States is a necessary party to any such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that *the State laws* are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

43 U.S.C. § 666(a) (emphasis added).

Nothing in the language Congress used limits the waiver to the laws described in the first sentence regarding appropriation of water rights. Indeed, the context indicates that Congress intended the two terms to refer to two separate sets of laws. *See King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (the meaning of a statutory term is to be determined based on the context in which it is used). The first reference to "State law" is in the singular and is used as a modifier of the term "appropriation." In the context of the first sentence, it is clear that Congress used the term "State law" to describe one of the types of water rights subject to adjudication.

The second reference to "the State laws" is plural, and the term is used as a noun to describe the state laws applicable to the United States "when a party to any such suit [for the adjudication or administration of water rights]." There is no indication, other than the bare similarity in the words used, that "the State laws" in the second sentence refers to the term "appropriation under

State law" as used in the first sentence.[13] Based on context, the most natural reading of the term "the State laws" in the second sentence is to describe those state laws governing the procedures that the United States must comply with when joined as a party to an adjudication or administration suit. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 931 (1991) ("[T]his Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to us to achieve a better result.").[14]

In addition to the plain language of the statute, the legislative history convincingly demonstrates that Congress intended the United States to be subject to all state laws governing the conduct of water right adjudications. In previous decisions, this Court has turned directly to the legislative history to construe the McCarran Amendment.[15] *District Court for Eagle County*, 401 U.S. at 525;

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[13] The United States' argument ignores the fact that "[t]he same words may have different meanings in different parts of the same act. . . . " *Lamar v. United States*, 240 U.S. 60, 65 (1916).

[14] As an alternative argument, the United States asserts that if Congress did waive immunity to state adjudication laws, such waiver extends only to "necessary" state laws. Brief for the United States at 23. This interpretation is unsupported in both the text of the statute and the legislative history and should be summarily rejected by the Court.

[15] Resort to legislative history is not unusual in construing waivers of sovereign immunity. Although this Court has rejected attempts to use legislative history to supply the needed "unequivocal expression" of waiver of sovereign immunity, when such is missing in the text of the statute, see, e.g., *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1016 (1992), it has often referred to the legislative history of waivers of sovereign immunity that are unequivocally expressed to determine the intended breadth of the waiver. *See, e.g., Bowen v. Massachusetts*,

Colorado River Water Conservation District, 424 U.S. at 810-811. Most often, the Court has used the legislative history to determine the congressional policy underlying the McCarran Amendment, and then has construed the Amendment to effectuate that policy. *Colorado River Water Conservation District*, 424 U.S. at 820; *San Carlos Apache Tribe*, 463 U.S. at 570.

The Senate Report on the McCarran Amendment indicates that the purpose of the Amendment is to make the United States "amenable to the law of the State" regarding general stream adjudications to the same degree as all other water users. S. Rep. No. 755, 82d Cong., 1st Sess. 6 (1951). The Senate Report makes clear that the state laws the Congress intended the United States to abide by were not the state laws governing appropriation, but rather the state laws developed for the purpose of adjudicating water rights:

> Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos
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> . . . .
>
> . . . *In the administration of and the adjudication of water rights under State laws* the State

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487 U.S. 879, 896-900 (1988); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 520 & n.13 (1984); *United States v. Mitchell*, 463 U.S. 206, 213-15 (1983). The Court has also stated that "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board*, 467 U.S. at 521 (citation omitted).

courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.

. . . .

. . . If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, *then the years of building the water laws of the Western States* in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters *will be seriously jeopardized.*

. . . .

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, *must be amenable to the law of the State,* if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82d Cong., 1st Sess. 3-6 (1951) (emphasis added). The Committee's primary concern was to preserve and protect the unique laws each state had developed for the general adjudication and administration of water rights. Indeed, the United States Department of Justice recognized this distinction when the McCarran Amendment was being considered by Congress. Mr. Veeder, who represented the United States Department of Justice in hearings on S. 18, stated:

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration of every State. *We would be forced – I went back and checked this when I got through with my last conversation with you – we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.*

A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights, Hearings on S. 18 Before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. 14 (1951) (emphasis added).

The United States' assertion that the second sentence of the McCarran Amendment only waives immunity to substantive state laws regarding perfection of appropriative water rights is not only inconsistent with this Court's prior decisions but, in fact, nonsensical. The McCarran Amendment does not create water rights but rather addresses the procedure for verifying existing rights. If the United States desires to aquire a water right pursuant to state law, it must necessarily follow state law because state appropriation laws define the right and the circumstances under which it may be obtained.[16] The application of state appropriation laws

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[16] The United States' assertion that the McCarran Amendment only waives federal immunity as to substantive state laws governing acquisition of state water rights does not relieve the United States from paying filing fees for water rights acquired under state law. Water rights held by the federal government pursuant to state law are subject to state laws that condition the retention of such property interests on "the performance of reasonable conditions that indicate a present intention to retain the interest." *Texaco, Inc. v. Short,* 454 U.S. 516, 526 (1982). Such conditions may include requirements that owners file notices of intent to hold the property when the state so requires. *Id.* at 529-30; *United States v. Locke,* 471 U.S. 84, 104 (1985). Failure to do so may result in forfeiture of the property interest. These provisions are especially applicable to unique property interests wherein the state retains significant interests in the underlying property. *Locke,* 471 U.S. at 104. Such is the case with water rights, which are subject to state control in the state's sovereign capacity as representative of all the people. *Walbridge v. Robinson,* 22 Idaho 236, 241-42, 125 P. 812, 814 (1912).

occurs by the United States' voluntary application for a water right and continues so long as the right continues to exist. Thus, an additional waiver to state appropriation laws in the context of a general stream adjudication is unnecessary. In essence, the effect of the United States' interpretation of the McCarran Amendment is to render the waiver to "the State laws" meaningless.

If this Court were to adopt the United States' position that the waiver to state laws applies only to those laws governing appropriation of water rights, the practical effect would be that the United States, once joined in a general stream adjudication, would comply only with state adjudication procedures it found not to be "objectionable."[17] Brief for the United States at 21. Chaos would result from this unworkable standard as the United States decided which procedures applied to it in each state and

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Water rights held under Idaho law are subject to statutory conditions: when required, the owner of the right must file a notice of claim in a general stream adjudication and pay the required filing fee. *See Idaho Code* §§ 42-237f, 42-1408A (1990 & Supp. 1992). A waiver to substantive state laws governing the acquisition of state water rights necessarily subjects the United States to such conditions the same as any private claimant. Thus, even under the United States' analysis, the United States must file notices of claim for water rights acquired under state law in accordance with the conditions specified by the state, including payment of adjudication filing fees.

[17] The United States Department of Justice, in opposing the McCarran Amendment, referred to the general waiver of immunity as "objectionable." S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951). Congress nonetheless overrode the Department of Justice's objections and enacted the McCarran Amendment as a general waiver of immunity. By asserting that it retains the right not to comply with "objectionable" procedures, the United States is attempting to resurrect the argument it lost in Congress as a substantive element of the waiver. This Court should reject the attempt.

even among adjudications within the same state. For instance, the United States might object to procedures such as deadlines for filing claims, objections and responses, evidentiary exclusions, discovery requirements or state law requirements regarding finality of judgments. *See Nevada v. United States*, 463 U.S. 110 (1983) (res judicata applies to bar the United States' attempt to reassert claim which was not filed by the United States on behalf of Indian Tribe). The eventual outcome would be two different sets of adjudication procedures in each adjudication: one set for the United States and one set for all other claimants. The United States could stall or disrupt the very proceedings Congress directed the government to participate in. This outcome would be in direct conflict with Congress' recognition that "comprehensive state systems for adjudication of water rights" are the best forum for quantifying all water right claims. See *Colorado River Water Conservation District*, 424 U.S. at 819.

1. Idaho's Filing Fee Is Part of the State's General Stream Adjudication Procedure and Therefore Comes Within the Scope of the McCarran Amendment Waiver.

The Court's prior decisions suggest the test for determining whether a specific state adjudication procedure is applicable to the United States: so long as the procedure is part of a "comprehensive state system" for the adjudication of water rights, the procedure is within the scope of the waiver. *See, e.g., Water Division No. 5*, 401 U.S. at 529; *Colorado River Water Conservation District*, 424 U.S. at 819; *San Carlos Apache Tribe*, 463 U.S. at 552.

If this test is applied to Idaho's filing fees, it must be concluded that the fees are part of Idaho's "comprehensive state system" for adjudication of water rights. The

filing fees are pivotal to the Idaho system of adjudication. The fees allow the state to centralize crucial procedures in a neutral, quasi-judicial entity. The IDWR perfects service to ensure that persons, parties and non-parties are bound by the decree. The IDWR also gathers all the claims, standardizes the information contained therein, compares the information to existing documentation of water rights, investigates discrepancies, and summarizes all information in a single source: the director's report. U.S. Exh. 3006 at 2-7. Such centralization of procedures provides services that could not be economically duplicated by the individual claimants:

> The usual comprehensive general adjudication statute provides for the state water administrative official to make a hydrographic survey of the river system. This survey generally involves identifying and measuring the sources of water and requires on-ground surveys to identify the points of diversion, irrigated acreage, and the location of storage reservoirs, canal systems, and other similar features.
>
> While it would be possible for each litigant to retain engineers and submit the evidence on his tract of land in the traditional contested lawsuit, it is unlikely that any one litigant could afford or justify a comprehensive survey of the whole river system. To get a comprehensive survey of the system, it is better to have the survey made by the state water administrative official.

C. Peter Goplerud III, *Adjudication of Water Rights*, in 2 WATERS AND WATER RIGHTS, § 15.02(b) at 229 (Robert E. Beck ed., 1991) (footnotes omitted).

The preparation of the director's report also serves to separate contestants from non-contestants, which frees

the court and the individual parties from having to do so through time-consuming litigation. *Id.* at 211.

Idaho would have to develop an entirely different system for the adjudication of water rights in the Snake River Basin if filing fees could not be imposed upon the United States. The system would be decentralized, placing a greater burden on the court and claimants to develop the information necessary to determine the 120,000 water rights at issue in the SRBA. In many instances, claimants would have to prove their water rights through expert testimony and exhibits. Small claimants would not be able to effectively participate because of the cost. Ultimately, the adjudication would become a forum in which only the rich could fully participate and the court would be confronted with the interpretation of state records by the major litigants without the full benefit of the state's expertise.

In the Montana adjudication, contrary to its present position before this Court, the United States admitted that the kinds of centralized services provided by Idaho and other states are an essential element of general stream adjudications. *See* Brief for the United States at 35-37.

> The United States is the largest single water claimant in the Montana adjudication, with over 32,000 water claims filed to date. In addition, in order to protect our extensive water rights for federal and Indian reservations, we have filed over 4,300 objections to claims listed in temporary preliminary decrees. Given the scope of the United States' water interests in the state, and the volume of its objections, the United States cannot be reasonably expected to investigate every water claim which might infringe on federal or Indian rights. The sheer number of filed

> claims and the size of many water basins creates an unmanageable situation for nearly all water users. Without DNRC[18] assistance most water users, who usually appear *pro se*, will not have the resources to make informed objections in the adjudication. DNRC performs a vital role in signalling to water users which claims are suspect and possibly worth challenging. In addition, the expertise of that agency is critical in providing information to the Water Court for use in all phases of the adjudication.

Brief in Support of Motion for Comparison Reports and Reverification at 27, *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within all Water Basins in the State of Montana,* (No. WC-88-1) (hereafter "United States' Montana Brief") (emphasis in original) (footnote omitted).[19]

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[18] Montana's Department of Natural Resources and Conservation performs a function substantially similar to the IDWR. *See* Montana Code Ann. Title 85, chap. 2, part 2.

[19] The State of Idaho discovered a copy of this brief for the first time when preparing this Response. Since it is an official pleading of the United States, this Court may take judicial notice of the brief. Federal Rule of Evidence 201; 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2410 (1971). This brief demonstrates the obstacles the United States continually throws in front of state court adjudications. If the Court strikes down Idaho's filing fees, the next appeal will be the United States' objection to the SRBA because the procedures are burdensome and Idaho is not providing adequate service. In the Montana adjudication, the United States asserted that: "[B]udgetary restrictions cannot justify an inadequate claims examination process. Under the 'adequacy' standards of the McCarran Amendment, one arm of the state (the judiciary) may not excuse an inadequate adjudication by pointing to the failure of another arm (the legislature) to appropriate funds." United States' Montana Brief at 31. The entire brief is attached as an appendix to this Brief.

This Court also has had occasion to review the need for the type of centralized administrative services provided by the IDWR, as well as the propriety of charging filing fees to finance such services. In *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916), the Court reviewed a due process challenge to adjudication filing fees that were used to pay the expenses of an administrative board that notified claimants, took statements of claim, received evidence, and made an advisory report to the court. *Id.* at 451.

The fees at issue in *Pacific Live Stock* were substantially similar to the Idaho filing fees. There was a fixed fee of one dollar and an additional variable fee for each acre of irrigated land. Hydropower claimants also paid variable fees depending on the number of theoretical horsepower generated by their facility. All other claimants paid a fee of five dollars. *Pacific Livestock v. Cochran*, 73 Or. 417, 144 P. 668, 672 (1914). The Court held that such fees were appropriate for a general water rights adjudication: "That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title goes without saying." 241 U.S. at 452 (quoting *Pacific Livestock Co. v. Cochran*, 144 P. at 672). This case was prominently quoted in the Senate Report on the bill that later became the McCarran Amendment to describe what constituted a

"general adjudication." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).[20]

The *Pacific Live Stock* decision confirms that filing fees have long been understood to be a necessary element of many state adjudication statutes. The United States has apparently recognized this fact, as demonstrated by its payment of filing fees in general adjudications in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, and Oregon.[21] R. 57-58, 92-106, 150-153, 158-60,

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[20] This Court has upheld other filing fees imposed to finance specialized adjudicatory systems. In *United States v. Kras*, 409 U.S. 434 (1973), the Court approved the imposition of filing fees as a condition precedent to a discharge in voluntary bankruptcy. The fees were determined to have a rational basis, since Congress "sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." 409 U.S. at 447-48. *Cf. Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (upholding Oregon appellate filing fee as rationally related to state's goal of offsetting operating costs of court system).

In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court upheld a user fee imposed to cover the United States' costs associated with establishing the Iran-United States Claims Tribunal, which arbitrated claims brought by Americans against the government of Iran. The *Sperry* decision is especially instructive, since the arguments made by Sperry in that case parallel those made by the United States in the present case. Sperry argued that the United States was "charging it for the use of procedures that it has been forced to use, or at least that it would rather not have used." 493 U.S. at 63. The Court responded that the mere existence of the Tribunal was of benefit to Sperry, since without it Sperry would have had to proceed through the federal court system, and would have had no assurance that any judgment it obtained "would have been readily collectible." *Id.*

[21] The United States paid some of these fees under protest. *See e.g.*, R. 45-47, 116, 118.

195, 608-16. The United States has characterized these as "de minimus assessments." Reply Brief for the United States at 9 (on petition for writ of certiorari). In some cases, however, the fees amounted to several hundred thousand dollars.[22] If, as the United States asserts, sovereign immunity bars the assessment of adjudication filing fees, then payment of the fees without explicit congressional authorization would have violated the well-established principle that neither the attorney general nor other federal officials have the authority to waive the sovereign immunity of the United States. *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896). The necessary implication of such payments is that the Department of Justice and other federal agencies have recognized the McCarran Amendment as authority for the payment of adjudication filing fees.[23]

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[22] The total fees paid by the United States in Arizona adjudications is approximately $320,000. R. 610.

[23] Indeed, specific acts of Congress authorize the United States to pay filing fees. For example, section 8 of the Reclamation Act of 1902 provides, in part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .

43 U.S.C. § 383 (1988). Obviously, state laws governing the conduct of adjudications are state laws "relating to the control, appropriation, use, or distribution of water." Section 8 therefore requires that water rights held by the Bureau of Reclamation be adjudicated in accordance with state laws.

Contrary to the United States' assertion, assessment of adjudication filing fees against the federal government will not substantively impact federal water rights claims. The filing fees are assessed on a per claim basis. As a result, they will always be limited simply because the number of claims filed by the United States must be finite. Adjudication filing fees are also limited by the McCarran Amendment's requirement that the United States be joined in only general adjudications. This requirement avoids application of state laws that are not rationally related to the adjudication of water rights. Those laws will necessarily apply equally to a host of differing claimants, whether private, state or federal. Thus, any attempt to increase the fees of the United States would raise the fees of other parties to the adjudication.[24]

Congress has supplied the necessary authorizations to federal agencies to spend money in order to comply with state water laws. Section 17j-2 of Title 16, U.S. Code, provides:

> Appropriations for the National Park Service are authorized for –
>
> . . . .
>
> (g) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights
>
> . . . .

A similar provision applies to the U.S. Forest Service. 16 U.S.C. § 526 (1988).

[24] The variable filing fees provided in Idaho Code § 42-1414 are non-discriminatory because they apply to "uses" rather than particular claimants. The United States is not singled out for application of special fees. Indeed, any fees applicable to the United States are also applicable to the state. The clearest example of this point is the fees for public instream flows, public lake levels maintenance and wildlife. I.C. § 42-1414(2)(c) (1990). Claims for such rights will be made by the Idaho Department of Parks and Recreation, the Idaho Water Resources Board, and the

Together, such limits on state procedures fully address the United States' concerns that state procedures may "trench upon important federal interests." Brief for the United States at 21.

As shown above, Congress intended for the United States to comply with comprehensive state adjudication procedures. Congress was also aware that these procedures generally required the state to provide certain centralized services and that fees were charged for these services. Since Idaho's filing fees support these same types of services, they come within the scope of the McCarran waiver of sovereign immunity.

2. The Services Financed By Idaho's Adjudication Filing Fees Benefit All Claimants, Including The United States.

Throughout its brief, the United States attempts to portray itself as an unwilling participant in the SRBA, and the services financed by Idaho's adjudication filing fees as being unnecessary and of little or no benefit to the United States. Brief for the United States at 12-13, 35-37. While Idaho believes that these factual assertions have no bearing on the proper interpretation of the McCarran Amendment, it should be understood that the assertions are not correct.

The genesis of the SRBA was a technical study committee appointed by the Governor in 1983. The technical study committee included, among others, representatives of the United States Department of the Interior Bureau of Reclamation and the United States Geological Survey.

Idaho Department of Fish and Game. The total fees for these agencies will be over $4 million. R. 200-02. Thus, Idaho has no incentive to make fees for such claims disproportionately large.

This committee unanimously recommended the initiation of the SRBA. SOF at 2-3.

More so than other claimants, the United States will receive special benefits from the completion of the SRBA. Federal water rights for over 23 million acres of federal land in the Snake River Basin are presently unquantified, and thus are not fully integrated into the state system for distribution of water, although they will comprise at least one-fourth of the claims in the SRBA. As other courts have noted, this "creates an undesirable, impractical and chaotic situation," *United States v. District Court for Eagle County*, 458 P.2d 760, 765 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971), in which the needs of federal reservations may go unfulfilled. Once federal reserved water rights are quantified in the SRBA, however, state water masters will distribute water for these federal needs. Tr. 991. Thus, the IDWR's efforts to facilitate the conclusion of the SRBA through centralization of adjudication procedures will unquestionably benefit federal agencies and Indian tribes holding reserved water rights.

In addition to the general benefits the United States will receive from adjudication of its water rights, it receives specific benefits from the centralization of adjudication services by the IDWR.[25] Without such procedures the United States would have to proceed on a

[25] Federal reserved water rights are abstracted based upon a state legislative accommodation to the federal government. The fact that federal reserved water rights are abstracted in the director's report, instead of being recommended by the director, does not diminish the benefit the United States receives from the adjudication. The primary benefit of the director's report is not the information it contains regarding one's own claims, but the information it provides regarding the claims of others. Additionally, the fact that reserved rights are abstracted in the

piecemeal basis, which would substantially increase its litigation costs.

After reviewing the benefits the United States will receive during the course of the SRBA, the district court concluded as follows:

> The filing fee is a reasonable charge assessable upon an "identifiable receipt for a measurable unit or amount of governmental service or property from which he derives special benefit." *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 349, 94 S. Ct. 1151, 1154 (1974). The ultimate beneficiary, the United States, is well served by having its water rights administered and adjudicated. This benefit is not obscure and the service which the United States receives, the quantification and prioritization of its water rights, cannot be "primarily considered as benefiting broadly the general public." *Id.; See also, National Cable Television Association v. United States*, 415 U.S. 336, 94 S. Ct. 146 (1974).

Memorandum Decision, April 11, 1991; Pet. App. 111a-112a.[26]

report does not affect other benefits, such as not having to serve process on other claimants.

[26] The trial court's factual determination that each claimant receives a specific benefit from the services provided by the IDWR was not disturbed on appeal, and likewise should not be disturbed by this Court. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

Additionally, the factual record undercuts the United States' alternative argument that even if Congress waived immunity to "necessary" state laws, Idaho's filing fees are not "necessary" to the successful completion of the SRBA. Brief for the United States at 23. The record shows that the services provided by the filing fees permit claimants, including the United States, to more effectively assert and protect their water right claims, by providing them with unbiased information and technical analysis regarding the hydrology of the basin as well as individual water right claims. The need for such information and analysis is absolutely necessary, and laws designed to facilitate the availability of such information are exactly the types of laws Congress had in mind when it enacted the waiver in the McCarran Amendment.

II. IDAHO'S FILING FEE IS NOT A "JUDGMENT FOR COSTS" PROHIBITED BY THE MCCARRAN AMENDMENT.

The United States attempts to portray the adjudication filing fee as a "judgment for costs" in order to bring it within the single exception to the general waiver of sovereign immunity in the McCarran Amendment. The Amendment states: "Provided, That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a). The United States' argument is not supported in law or fact.

The Court has recognized that when Congress enacts a sweeping waiver of sovereign immunity, such as the McCarran Amendment, exceptions to the waiver should be construed narrowly.

> We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the "sweeping language" of

> the Federal Tort Claims Act . . . or as in the context of equally broad "sue and be sued" clauses. . . .

United States v. Nordic Village, Inc., 112 U.S. 1011, 1014 (1992).

When construing exceptions to sweeping waivers of immunity, "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). The "proper objective" of the Court when construing exceptions to a broad waiver of immunity "is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Id.*, quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953). *See also United States v. Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1951).

Application of these rules of construction leads to the conclusion that the prohibition against "judgments for costs" does not extend to the type of adjudication filing fees required by Idaho law. The distinction between costs and fees is well established:

> "Costs" refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in action. . . . "Fees" are those amounts paid to the court or one of its officers for particular charges that typically are delineated by statute.

10 WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE, § 2666 (1983) ("Costs, Fees, and Expenses Distinguished"), *cited in Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). Costs are thus in the "nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court." 20 C.J.S. Costs § 2 (1990). Fees "are compensation to public

officers for services rendered individuals, in the progress of the cause." *Id.* § 3.

Given the historic distinction between costs and fees, the filing fees required by Idaho Code § 42-1414 do not fall within the "judgment for costs" exception to the McCarran Amendment waiver. The fees bear no resemblance to "costs," since they are not used to indemnify the successful adversarial litigant. The filing fees instead fit squarely within the traditional definition of fees. *See Sperry* and *Kras, supra* at n.20. They are used to fund the expenses of the courts overseeing the adjudication, and the expenses of the services that the IDWR renders in progress of the adjudication. *See* Idaho Code § 42-1777 (1990).

Indeed, the adjudication statutes in existence in 1952 distinguished between fees and costs. Filing fees were a substantial source of adjudication funding for some states. The United States implies that at the time of passage of the McCarran Amendment, other western states, including Senator McCarran's home state of Nevada, only funded their adjudications with judgments for cost. Brief of the United States at 30, n.12. This argument is based upon a mischaracterization of the general adjudication statutes in Arizona, Oregon and Nevada.

Many western state statutes at the time of enactment of the McCarran Amendment included provisions for either filing fees or apportionment of expenses, or both, as funding mechanisms for general adjudications. The adjudication provisions associated with the State of Nevada, Senator McCarran's home state, specifically provided for a graduated filing fee like Idaho's present statute, as well as judgments for costs. Nevada Compiled Laws §§ 7914, 7930 (1929) (Idaho Exh. 252). Arizona and

Oregon also received substantial funding for general stream adjudications from graduated filing fees. Arizona Code of 1939 § 75-137 (Idaho Exh. 243); Act of March 6, 1947, Ch. 88, § 2, 1947 Or. Laws 99, 100 (Amending Oregon Compiled Laws Annotated § 116-807) (Idaho Exh. 262). California, Colorado, and Washington charged a flat fee for filing a notice of claim. Brief of the United States 30, n.12.[27]

Congress and the United States Department of Justice were certainly aware of this distinction. When Mr. Veeder, Special Assistant to the Attorney General, testified

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[27] The United States mischaracterizes the Arizona, Nevada and Oregon adjudications when it attempts to distinguish between the initial administrative activities and the judicial proceedings in their adjudications. Brief of the United States at 30, n.12. Adjudications in those states often started with significant quasi-judicial administrative investigations which narrowed the issues; however, the adjudication was finalized by judicial proceedings. Arizona Code of 1939 §§ 75-114 -127 (Idaho Exh. 243); Nevada Compiled Laws §§ 7905-7929 (1929 & Supp. 1942) (Idaho Exhs. 252, 253); Oregon Compiled Laws Annotated §§ 116-801 through -823 (1940) as amended by Act of March 6, 1947, Ch. 88, § 2, 1947 Or. Laws 99, 100 (Idaho Exhs. 261, 262). The only distinction, and this is not a significant difference, is that the judiciary did not take jurisdiction until after the administrative activities, rather than before, as it does in Idaho.

Further, the United States failed to inform the Court that the Oregon system, including its administrative component, has specifically been held to constitute a "suit" under the McCarran Amendment. *United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568, 1575-1576 (D. Or. 1991). When construing "sue and be sued" clauses, the Court has recognized that the governmental corporation has been "sued" when subjected to administrative process. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 525 (1984).

before the Subcommittee of the Committee on the Judiciary of the United States Senate, he stated that he had checked the state laws and that the United States "would be forced to have 17 different procedures west of the one hundreth meridian" to try its litigation if Senate Bill 18 was enacted. *A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights, Hearings on S. 18 Before A Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess. 14 (1951). Further, the Senate Report on S. 18 focused heavily on *Pacific Live Stock*, a case involving adjudication filing fees, *supra*. Despite its awareness of the distinction between filing fees and "judgment for costs," Congress chose to except only "judgment for costs."

A further distinction is that no "judgment" is involved in collection of the fees. The filing fees must accompany the initial filing of a notice of claim. Idaho Code § 42-1414 (1990). The fees do not depend on the entry of the state court's "judgment" and therefore are unlike "costs," which are awarded only upon issuance of a judgment and the determination of who is the prevailing party. 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE §§ 2666, 2667 (1983). Thus, a plain reading of the "judgment for costs" proviso requires that the fees fall outside the proviso.

The United States, however, labors to portray the fees as a "substitute" for costs by casting the IDWR and the United States as adversarial parties in the SRBA. In order to portray the IDWR and the United States as adversaries, it attempts to convince the Court that Idaho's filing fees will be used to fund adversarial litigation activities. Brief for the United States at 8-9. The United States goes so far as to assert that "the Director will actually employ the filing fees paid by the United States to fund, among other

things, challenges to the United States' water right claims." Brief for the United States at 37.

The assertions of the United States are not relevant to this proceeding nor are they supported by either the record[28] or the decisions below. Use of the filing fees is limited by Idaho Code 42-1777 and the law of the case. The district court carefully examined expenditures from the adjudication account during a three-day trial, and concluded as follows:

> The main thrust of the United States' argument is that counsel and staff to the Director serve in a capacity which is adversarial to theirs. However, in using the term "adversarial," care must be taken in its application to the adjudication process. When the Director is performing a duty which is part of the administration of the adjudication as set out in the statutes, he is entitled to have staff support to assist in the performance of those duties. Where the Director or his staff perform acts which are reasonably and rationally related to his statutory duties, costs associated with the performance of those duties may be born [sic] by the adjudication account. *In so far as the activities of the Director*

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[28] In its brief, the United States makes numerous citations to the record in support of its statement that the filing fees pay "various litigation costs that the State incurs in challenging [water right] claims." Brief for the United States at 9. The cited portions of the record, however, make no mention of state *challenges* to water right claims, but describe expenses the IDWR will incur in defending the director's report. *See* U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 384-385, 390-91, 396-398, 547-553, 595. In fact, Dave Shaw, the chief of the IDWR adjudication bureau, expressly testified that if the IDWR objects to federal reserved claims, costs associated with such objections would not be billed to the adjudication account. Tr. 382, 386, 396.

> *and any expenditures made on behalf of those activities are reasonably and rationally related to his duties under the adjudication statutes, he is neither an adversary nor an adversarial party. In performing his duties leading to the issuance and filing of the Director's report, he acts in a quasi-judicial capacity.* When the Director proceeds outside his quasi-judicial statutory capacity, and becomes a party opponent in this litigation matter, costs associated with such efforts become a general revenue obligation of the state.

Memorandum Decision, April 11, 1991; Pet. App. 107a-108a (emphasis added).

Likewise, the Idaho Supreme Court reviewed Idaho adjudication statutes and found that the Director's role in the adjudication is not analogous to that of a traditional adversarial party:

> A general water adjudication brought by the state is analogous to an interpleader action. . . . The position of the director of the Department of Water Resources is analogous to the "stakeholder" in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated.

Pet. App. 15a-16a (citation omitted).

The determinations of the district court and Idaho Supreme Court regarding the IDWR's role under state statutes are binding on the parties. Despite the United States' attempt to reopen the issue, the state courts' determinations regarding the non-adversarial role of the IDWR under state law are not subject to further review. *See, e.g., Garner v. Louisiana,* 368 U.S. 157, 169 (1961) (state supreme courts "have the final authority to interpret . . . that state's legislation.").

The fact that Idaho's filing fees are used to support quasi-judicial services brings them squarely within the waiver of the McCarran Amendment. There is no indication, either on the face of the statute or in the legislative history, that Congress intended to include such fees within the prohibition against "judgment for costs." Indeed, every indication is that Congress expected such fees to be assessed as a common feature of adjudication laws. Congress cited the *Pacific Live Stock* as the preeminent description of adjudication procedures, and *Pacific Live Stock* emphasized the need for adjudication filing fees. In addition, the Senate Report explaining S. 18 noted that states commonly required graduated annual fees for the service of water commissioners who apportion water to decreed water users. S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). Despite its awareness that states often associated fees with the adjudication and administration of water rights, Congress carefully chose to limit the exception in the McCarran Amendment to "judgment for costs." This Court must adhere to the narrow language used in the exception, and refuse the invitation of the United States to expand the exception beyond the bounds contemplated by Congress.

CONCLUSION

The judgment of the Idaho Supreme Court should be affirmed.

Respectfully submitted,

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January 1993

APPENDIX

IN THE WATER COURTS OF
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****

IN THE WATER COURTS OF
THE STATE OF MONTANA

****

IN THE MATTER OF THE)
ADJUDICATION OF THE)
EXISTING RIGHTS TO THE)
USE OF ALL THE WATER,)
BOTH SURFACE AND)
UNDERGROUND, WITHIN)
ALL WATER BASINS IN THE)
STATE OF MONTANA.)
_____)

BRIEF IN SUPPORT OF MOTION FOR COMPARISON REPORTS AND REVERIFICATION

I. INTRODUCTION

Through the motion accompanying this brief, the United States has moved this Court for an order requiring

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Please note: any misspellings throughout the appendix have intentionally been left that way to show how it actually appeared in the original document.

the DNRC to (1) issue reports comparing the effects of applying the previous verification procedures with the effects of applying the current Water Right Claims Examination Rules in those basins for which temporary preliminary or preliminary decrees have been entered, and (2) conduct reverification, employing the new Claims Examination Rules, in those basins for which comparison reports have been prepared to date. Below, we set forth the reasons supporting this relief.

II. STATEMENT

A. *Background of Stipulation and Claims Examination Rules.* – In 1985, the United States and other water claimants filed petitions for writs of supervisory control which complained of, *inter alia*, inadequate verification of claims by the DNRC. Specifically, the United States alleged in Count I of its petition for writ of supervisory control in *United States* v. *Water Court*, No. 85-493, that the Water Court had failed to develop sufficient verification procedures for various nonirrigation claims, notably mining use claims. (See U.S. Brief in Support of Petition in No. 85-493, pp. 4-6.) This contention was also advanced by the state's own Department of Fish, Wildlife and Parks (DFWP), which alleged in Count VII of its petition that "[t]he Water Court's failure to develop and apply proper verification procedures as described [elsewhere in the petition] will result in exaggerated or invalid water right claims being granted in the final decrees." (See DFWP Petition for Writ of Supervisory Control, Etc., in *Montana*

Dept. of Fish, Wildlife and Parks v. *Water Court*, No. 85-345, p. 24, para. 94.)[1]

The verification issues raised in the United States' and DFWP's petitions were not resolved by a decision of the Montana Supreme Court. Instead, the United States, DFWP, and other parties entered into a Stipulation with the Water Court which was designed to address verification problems, among others. The Stipulation was filed with the Supreme Court on February 19, 1986. On the strength of the Stipulation, the United States and DFWP moved to voluntarily dismiss their petitions without prejudice pursuant to Mont. Rule App. Civ. P. 36. The Montana Supreme Court has not, to date, entered an order dismissing the petitions.

The Stipulation, at pp. 9-13, embodied the parties' agreement on the verification of claims. The Stipulation provides that, if certain conditions are met, the Water Court shall issue an order "that applies to any basin or subbasin authorizing DNRC to conduct field investigations where DNRC or the Water Court finds an investigation necessary to achieve the accuracy of the adjudication." (Stipulation, para. 26 B., C., pp. 10-11.) Paragraph 30 of the Stipulation provides for retroactive application of the verification procedures adopted pursuant to the Stipulation in those basins where temporary preliminary or preliminary decrees have been issued. In those basins, para. 30 requires the DNRC to file a report

[1] The original "verification manual" for water right claims had been devised by the Water Court with input from DNRC, and contained legal rulings, Water Court procedures, as well as technical materials and procedures of DNRC.

with the Water Court "comparing the previous verification procedures with the verification procedures adopted pursuant to this Stipulation." (Stipulation, p. 12.) Thereupon, the Water Court on its own motion, or on the request of any person including the DNRC, may order the DNRC to apply the verification procedures adopted pursuant to the Stipulation to any of those basins. The Water Court is to grant such requests "upon good cause shown" (Stipulation, pp. 12-13).

Paragraph 43 of the Stipulation (pp. 17-18) provides that in the event revised verification procedures are retroactively applied to basins in which temporary preliminary or preliminary decrees have been issued, prehearings and hearings shall be reopened to consider additional evidence produced as a result of DNRC's verification of affected claims. In paragraph 47 of the Stipulation, the parties reserve the right "to take appropriate legal action to enforce the terms of this Stipulation or to ensure that accurate and legally defensible decrees will be issued" (Stipulation, p. 19).

Following the agreement of the parties to the Stipulation, DNRC proceeded to draft new claims examination procedures. At this point, the Water Court and the DNRC became involved in a dispute over the manner in which the revised verification procedures contemplated by the Stipulation were to be developed. Specifically, DNRC contended that the rules should be promulgated under the Montana Administrative Procedures Act (MAPA), Title 2, Chapter 4, M.C.A. (1984), and the Water Court disagreed. By orders of July 23 and August 8, 1986, the Water Court prohibited DNRC from following the MAPA process of developing the claims examination rules.

DNRC (along with the Montana Board of Natural Resources and Conservation, or BNRC) appealed these orders to the Montana Supreme Court, which by decision of March 31, 1987, held that MAPA did not govern the promulgation of claims examination rules. *In re Dept. of Natural Resources and Conservation*, 740 P.2d 1096 (1987). Instead, the Supreme Court stated that it would exercise its discretionary power under § 3-7-103, M.C.A., to promulgate the rules itself. On July 7, 1987, the Supreme Court issued water rights claims examination rules reflecting input from both the Water Court and the DNRC.

The Supreme Court noted that it was adopting, "practically without amendment or deletion," the rules suggested by DNRC for processing water claims once they are referred to DNRC by the Water Court for examination. (Exhibit A, Order Adopting Water Right Claim Examination Rules, filed July 7, 1987, pp. 3-4.) In other words, the verification rules for examining claims once they are referred to DNRC which were developed by DNRC pursuant to the Stipulation were, without substantial modification, issued by the Supreme Court. The Supreme Court's order also declared that the claims examination rules it was issuing "shall govern from [July 15, 1987] the practice and procedure respecting water claims examinations before the water court and DNRC," unless otherwise amended by the Supreme Court. (Order, p. 5.)

The Supreme Court in its July 7 order indicated that the Water Court possessed the authority to order application of the new claims examination rules to basins which had already been examined using the old "verification

manual," including basins in which temporary preliminary decrees have been issued. (Order, pp. 2-3.)

As noted above, the recently issued claims examination rules originated in the rules which were prepared by the DNRC pursuant to the Stipulation. The Chief Water Judge has indicated that he does not regard the Stipulation as binding, at least on the question of whether basins should be re-examined under the new verification procedures. (See Exhibit A-1, letter from Judge Lessley to Steven Brown, dated December 3, 1987; Exhibit B, letter from Judge Lessley to Steven Brown, dated December 11, 1986; Exhibit C, Letter from Judge Lessley to Gary Fritz, dated August 19, 1987, p. 2; Exhibit D, Order dated August 7, 1987, pp. 3-4.)

B. *Background Demonstrating the Need for Comparison Reports and Reverification.*

1. *Basins in which temporary preliminary or preliminary decrees have been entered.*

a. *Procedural background.* – As noted above, para. 30 of the Stipulation envisioned that DNRC, in those basins where temporary preliminary or preliminary decrees have been issued, "shall file a report with the Water Court comparing the previous verification procedures with the verification procedures adopted pursuant to this stipulation." (Stipulation, p. 12.) Thereupon, the Water Court may order DNRC "to apply the procedures adopted pursuant to this Stipulation to any of those basins," *i.e.*, to reverify those basins. (Stipulation, para. 30, pp. 12-13.) Thus, under the regime of the Stipulation, the production of a "comparison report" is the critical first step to obtaining reverification of a basin which is

the subject of a temporary preliminary or preliminary decree.

By letter dated July 29, 1987, DNRC informed Judge Lessley that, pursuant to the Stipulation, DNRC intended to complete the comparison reports for decreed basins before scheduling claim examination in non-decreed basins (Exhibit E, letter from Gary Fritz to Judge Lessley, pp. 1-2). In response, the Water Court issued an order dated August 7, 1987, which barred DNRC from preparing any comparison reports for decreed basins without the approval of the Water Court, and also directed DNRC to submit to the Court a list of previously decreed basins "in which the Department feels a comparison report should be considered by this Court." (Exhibit D, Order, p. 4.) By letter to Judge Lessley dated August 18, 1987, DNRC stated that a comparison report should be considered by the Court for every previously decreed basin (Exhibit F, letter from Gary Fritz, p. 4).

b. *The need for adequate verification in decreed basins.* – There is a need for adequate verification in at least some basins under temporary preliminary or preliminary decree, because of the large numbers of inflated and otherwise inaccurate claims filed in those basins. The United States believes that the practice of filing excessive and unsupported water claims has been widespread in this adjudication. Many claimants may have filed exaggerated claims under a misunderstanding of the function of a water claim. Some claimants may have believed that they were expected to claim all the water which they might need in the foreseeable future, as opposed to the water they have actually put to beneficial use.

The affidavit of United States Forest Service employee James Wardensky (Exhibit G) supports this view, as Mr. Wardensky states that he heard DNRC personnel advise potential water claimants to claim the maximum amount of water needed for future development of the claimants' land, instead of the amount of water actually being applied to the land. (*Id.*, pp. 1-2.) Claimants also told Mr. Wardensky that DNRC personnel had encouraged claimants to file on old claims without regard to whether water was being or had ever been used, and to request the maximum amount of water. (*Id.*, p. 2.)

Affidavits attached as exhibits to this brief indicate that there is a serious problem of inflated water claims in the temporary preliminary decrees of some basins:

(1) *Basin 41H (Gallatin River).* – The United States has reason to believe that many of the claims filed in the Gallatin Basin are excessive.[2] This conclusion is supported by computer analyses conducted by the United States Bureau of Reclamation (USBR) and the Bureau of Indian Affairs (BIA). These analyses focussed on the claims objected to by these federal agencies. The USBR analysis and supporting affidavit of Robert Pike is attached hereto as Exhibit I. That report discloses that USBR objected to 79 claims in Basin 41H, all of which had been the subject of "grey area remarks" by the DNRC (Exhibit I, p. 1). With respect to these claims, USBR compared the decreed acreage with (1) acreage verified by

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[2] The United States indicated the necessity of reverification in Basin 41H in a communication to the Water Court dated March 27, 1986. (See Exhibit H, letter from John Hill, counsel for the United States, to Judge Lessley, p. 2.)

DNRC from aerial photographs and (2) acreage verified from the Gallatin County Water Resources Survey by DNRC or USBR, or both. USBR discovered that irrigated acreage verified from aerial photographs for the claims reviewed averaged 58% less than the acreage claimed and decreed. The irrigated acreage verified by DNRC from the Water Resources Survey (published in 1953) averaged 85.3% less than the irrigated acreage claimed and decreed. *Id.*

The BIA investigation of claims to which that agency objected in the Gallatin Basin (and supporting affidavit of Douglas J. Oellermann) yielded similar results. Of the claims reviewed, decreed irrigated acres were reduced by an average of 38.8% when verified by DNRC utilizing aerial photographs, when one claimant's large acreage was removed from the analysis (Exhibit J, p. 4). The average reduction in decreed irrigated acreage when compared with the Water Resources Survey by BIA was 57.8% (*id*).

(2) *Basins 76B, C, D, E, K, L, M, N.* – The United States Forest Service has been investigating water right claims which could adversely impact the National Forests. The attached affidavits of Forest Service personnel demonstrate that there was a substantial number of inflated and otherwise inaccurate claims filed in several basins, including Basins 76 C, D, E, K, L, M, and N.

The affidavit of Regional Hydrologist Ronald L. Russell (Exhibit K) states that to date the United States has filed objections to 841 claims which mights adversely affect National Forest interests in 24 basins. The Forest Service's experience with 182 objections to claimed flow

rates illustrates the necessity of a more comprehensive and thorough claims examination process. Of these 182 objections, all but 28 were resolved by dismissal or withdrawal of the claims by the claimants, denial or dismissal by the Water Court for default, or reduction or modification by stipulation (*id.*, p. 1, para. 5). In the Forest Service's experience, in most cases the flow rates were reduced or the claims were withdrawn when challenged by the United States. For example, in Basin 76D 24 claims aggregating 261.32 cubic feet per second (c.f.s.) were reduced to three rights totalling 1.70 c.f.s., and in Basin 76M 60 claims amounting to 442.26 c.f.s. were reduced to 21 rights aggregating 57.16 c.f.s. as a result of the United States' objection. Had the United States not objected to these claims they would have probably been decreed. (*Id.*, p. 1, para. 6).

The affidavit of Arne E. Rosquist, Forest Hydrologist for the Lolo National Forest, states that based on Mr. Rosquist's experience in reviewing the temporary preliminary decrees for Basins 76E, M and N, the Forest Service has objected to water claims on basically three grounds: (1) gross errors in the legal description of either the point of diversion or the place of use; (2) excessive claimed volumes or flow rates; and (3) claims for non-existent uses. (Exhibit L, para. 1.)

The affidavit of James Wardensky, a Forest Service hydrologic technician assigned to the Kootenai National Forest, recites that, based on Mr. Wardensky's experience in attempting to verify water claims in Basin 76D (Kootenai River), the following discrepancies were often present in claims: legal descriptions of point of diversion, place of use or both were inaccurate; water transmission

lines and ditches were non-existent and had not been used in some time; amounts of water to be used for mining purposes were based on old county water appropriation records and were greater than actual uses; and some claimed mining uses were non-existent. (Exhibit G, p. 2, para. 1-4.)

The affidavit of Larry Meshew, formerly a Forest Service hydrologist assigned to the Kootenai National Forest, declares that in the temporary preliminary decree for Basin 76D, there is a total of 190 c.f.s. and 46,000 annual acre-feet (a.a.f.) claimed by various parties from Therriault Creek for irrigation uses in the April 1 to October 4 time period. However, Mr. Meshew calculated that there was an annual water yield from the watershed of Therriault Creek of only 11,000 a.a.f., *i.e.*, less than a fourth of the water claimed. Even Mr. Meshew's most liberal calculation of watershed water yield amounted to only 31,000 a.a.f. (Exhibit M, para. 4). The channel stability and fishery of Therriault Creek indicate that the claimed amounts have never been diverted. (*Id.*, para. 5.)

The situations outlined in the foregoing affidavits by federal personnel involved in the adjudication are not the only examples of excessive and inaccurate water claims, nor is the problem of inflated claims restricted to the basins noted above. The Forest Service and other federal agencies [have] only been able to investigate a fraction of the claims filed to date. Most claims, if they are to be examined, must be examined by DNRC.

2. *Basins in which no decrees have issued.* – DNRC, in a letter to Judge Lessley dated July 29, 1987 (Exhibit E), stated that it believes that all basins or sub-basins which

were verified using the old procedures and in which no temporary preliminary or preliminary decree had issued should be reverified using the new claims examination rules. In an order dated August 6, 1987 (Exhibit N), the Water Court stated the Court would decide whether there was a need for re-examination, either partially or wholly, in such non-decreed basins. The Water Court identified five basins which fit this description: Basins 40K (Whitewater River), 43A (Shields River), 40C (Lower Musselshell), 41G (Jefferson River), and 41C (Ruby River). (Order, p. 3.) The Court gave DNRC permission to file within 30 days of the date of the order a "Motion for Order to Re-examine" in any of these five basins (Order, p. 3). By letter to Judge Lessley dated August 14, 1987, DNRC declined to submit such a motion. (Exhibit O, Letter from Gary Fritz, p. 1.) Finally, on September 4, 1987 (Exhibit P), DNRC submitted reports for the five basins which, as a practical matter, constituted "comparison reports" as contemplated by the Stipulation (although, unlike the comparison reports which were the subject of para. 30 of the Stipulation, these five reports deal with *undecreed* basins).

The five comparison reports conclude in effect that the application of the new claims examination rules to these basins which have already been verified using the old verification manual would result in more accurate, defensible decrees of water rights. The reports disclose that the use of the new claims examination procedures may have a major impact on the information provided to the Water Court regarding a number of critical subject areas, including claimant contact, field investigations, amendments to claims, point of diversion, means of

diversion, reservoirs, type of irrigation system, place of use, volume, flow rate, and purpose of some uses. (See Exhibit Q, Comparison Reports, Table 1.) According to the reports, over one-half of the new procedures are "significantly different" from the old procedures.

The report for Basin 40C (Musselshell River below Roundup Drainage) is typical. There, the DNRC reports that "the consistency and accuracy of the decree should be improved using the new procedures." (Exhibit Q, Basin 40C Report, p. 2.) Among other specifics, the report notes that the Department's ability to gather information from claimants has been "greatly expanded" under the new rules, and the new rules provide for more detailed information to be communicated to the Water Court (*id.*, pp. 2-3). Significantly, DNRC states that application of the new rules would uncover "issues" involving claimed water rights (presumably including instances of inaccurate and excessive claims) which to date have not been revealed under past verification procedures. (*Id.*, p. 3.)

By order filed on October 19, 1987 (Exhibit R) the Water Court decided that "there is no apparent necessity sufficient to justify the costs of re-examining" Basin 40C. To our knowledge the Court has not yet ruled on the need for reverification of the other four undecreed basins (i.e., 40K, 43A, 41G, and 41C) for which comparison reports were produced.

III. ARGUMENT

Below, we demonstrate that the relief requested in the motion is required under both federal and state law. Under the standards of the McCarran Amendment, 43

U.S.C. 666, Montana is required to provide an adequate adjudication of water rights, including rights based on federal and state law. Unless the relief requested in the motion is granted, this adjudication will be inadequate under the McCarran statute. Furthermore, under principles of state law, the DNRC's role is essentially that of an expert witness whose expertise is critical to the achievement of accurate water right decrees which comport with the McCarran Amendment and due process. Unless the relief sought in the United States' motion is provided, DNRC will not be able to fulfill its role as expert in a professionally adequate manner, thus endangering the integrity of the entire adjudication. Finally, pursuant to the Stipulation, the Water Court should permit the DNRC to issue comparison reports for basins already under temporary preliminary or preliminary decree.

A. *The McCarran Amendment Requires Adequate Verification of Claims in All Basins.* – As discussed below, the statute which enables the adjudication of federal and Indian reserved rights to proceed in state court – the McCarran Amendment, 43 U.S.C. 666 – envisions a determination of these rights which meets a certain standard of procedural adequacy. In the Montana Water Court adjudication, much if not all of the verification of water claims conducted to date has fallen short of satisfying this standard, thus calling into question the statutory basis for joining the United States in this proceeding.

1. *The decisional law interpreting the McCarran Amendment demonstrates the requirement of adequate claims examination procedures.* – The McCarran Amendment waives the sovereign immunity of the United States from joinder in a suit "for the adjudication of rights to the use

of water of a river system or other source * * * " where the United States claims water rights and is a necessary party to such suit. 43 U.S.C. 666 (a). The McCarran statute, as any Act which consents to suit against the United States, must be strictly construed in favor of the United States. *Library of Congress* v. *Shaw*, 106 S. Ct. 2957 (1986), citing *McMahon* v. *United States*, 342 U.S. 25, 27 (1951).

Since 1952, when the statute was enacted, the courts have described the scope and limitations of the waiver of sovereign immunity afforded by the Amendment. One important condition to the consent to suit is the requirement that the adjudication scheme be "adequate" to determine federal and Indian reserved rights, as well as other rights at stake in the proceedings. The United States Supreme Court has decided that, as a general proposition, state courts may be adequate forums for adjudicating federal and Indian reserved rights. In support of this conclusion, the Court has stated that state courts have access to special expertise in adjudicating water rights. It follows, then, that if the expert water agency of the state is willing to perform its function in the adjudication, but is prevented from doing so by the Water Court, the jurisdictional basis for joining the United States in this adjudication may be defeated.

In *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976), the United States Supreme Court ruled that the McCarran Amendment's waiver of sovereign immunity included consent to determine in state court reserved water rights held on behalf of Indians. The single most important consideration which led the Court to this conclusion was the "clear federal policy" of avoiding "piecemeal litigation." *Colorado River*,

supra, 424 U.S. at 819. The Court stated that, as a general matter, Indian interests may be satisfactorily protected under regimes of state law. *Id.* at 812. However, in the course of permitting Indian reserved rights to be determined in Colorado's general stream adjudication, the Court explicitly left open the possibility that state court jurisdiction might be defeated "if the state proceeding were in some respect inadequate to resolve the federal claims." *Id.* at 820.[3]

In *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Supreme Court, extending the rationale of *Colorado River*, decided that the federal district courts in Arizona and Montana were correct in deferring to state court adjudications of federal and Indian reserved rights. This decision was based on the assumption "that the state adjudications are adequate to quantify the rights at issue in the federal suits," and also relied on the policies behind the McCarran Amendment, "the expertise and administrative machinery available to the state courts," the infancy of the federal suits, the judicial bias against piecemeal adjudication and the convenience to the parties. *San Carlos*, *supra*, 463 U.S. at 570. Elsewhere in the opinion, in the course of rejecting arguments by the United States and the Indians, the Court attached significance to "the specialized resources and experience of the state courts." *Id.* at 569.

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[3] See also *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), and *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971), holding that federal non-Indian reserved rights are subject to general adjudication in state proceedings under 43 U.S.C. 666.

In the now famous "Footnote 20," the *San Carlos* Court noted that there remained in the cases before the Court challenges "to the jurisdiction or adequacy of the [Arizona and Montana] proceeding[s] * * * to adjudicate some or all of the rights asserted in the federal suit[s]." The Court pointedly noted that the federal courts in those two states "should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate." *Id.* at 570 n. 20.[4]

In the wake of the *San Carlos* decision, both the Montana and Arizona Supreme Courts have had occasion to consider some of the issues raised by the United States Supreme Court's opinion in that case. In *State of Montana ex rel. Mike Greely* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 758, 762-768 (1985), the Montana Supreme Court held that the Montana Water Use Act under which this adjudication is being conducted is "adequate on its face" to determine Indian and federal reserved water rights, although upon a proper factual record the Act as applied might be found to be inadequate in the future.[5]

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[4] *San Carlos* also instructed the lower federal courts that resort to the United States district courts in Arizona and Montana should remain available "if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 n. 21 (1983).

[5] In *United States v. Superior Court, Maricopa County*, 697 P.2d 658 (1985), the Arizona Supreme Court sustained the state court general stream adjudication against challenges levelled by the United States and Indian tribes in the wake of the *San Carlos* decision.

In addition to the decisional law interpreting the requirements of the McCarran Amendment discussed above, the legislative history of the Amendment discloses that Congress envisioned joinder of the United States in proceedings in which water would be apportioned in an "honest [and] fair" manner. See, *e.g.*; S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). An adjudication in which inaccurate claims cannot be effectively investigated by the DNRC – despite its desire to do so – hardly comports with this standard. This adjudication is not "honest and fair" to all of the parties thereto, because of the lack of due process which results from placing the burden on every party of examining all other claims to rebut the claims' *prima facie* validity. See M.C.A. § 85-2-227.

Thus, it appears from the foregoing that if the Montana water adjudication, as actually conducted, is inadequate in its utilization of the expertise and administrative machinery of the DNRC, the limited waiver of sovereign immunity effected by 43 U.S.C. 666 does not authorize the joinder of the United States in the adjudication. Below, we demonstrate that the inadequate verification of claims under the old verification manual is a serious problem, as recognized by the expert water resources agency of the State. (See Exhibit Q.)

2. *In the absence of reverification, the claims examination process conducted by DNRC will be inadequate under the standards of the McCarran Amendment.* – There are compelling indications that much of the verification of claims

conducted by DNRC under the former claims examination manual is not sufficient to provide the Water Court with the information and assistance which the Department is charged with providing under M.C.A. § 85-2-243. That section directs the DNRC, subject to the direction of the water judge, to provide information and assistance required by the water judge to adjudicate claims of existing rights, conduct field investigations of claims which the water judge in consultation with the department determines warrant investigation, and provide the water judge with all information in its possession bearing upon existing rights. Inadequate claims examination by the DNRC has occurred in both decreed and undecreed basins.

a. *There is a factual basis for concluding that at least some decreed basins have not been adequately verified.* – As set forth in the Statement, *supra*, at II. B., there are strong indications that the filing of excessive and otherwise inaccurate water claims has been pervasive in this adjudication. The affidavits of federal personnel summarized in the Statement show that many claimants have claimed water without regard to beneficial use, to the point that, in at least one case, claims from a water source (Therriault Creek) exceeded available water by over 400%. The existence of large numbers of erroneous claims in numerous basins, in and of itself, is sufficient reason for DNRC to conduct thorough and comprehensive claims examinations as a general rule in this adjudication. In addition to the data demonstrating the filing of many inflated claims, there are indications that at least some of the decreed basins have not been adequately verified by DNRC under the old verification manual, and that re-

examination of claims filed in these basins, using the new verification rules, would substantially improve the quality of DNRC's claims examination and lead to the entry of soundly-based decrees.

(1) *Data from federal agencies demonstrates the need for re-examination of claims in at least some decreed basins.* – Data compiled by USBR and BIA demonstrates that DNRC's verification of claims in Basin 41H would be significantly improved under new claims examination rules. The USBR study concludes that DNRC verified 38% of all irrigation claims in the basin with a single source (such as aerial photography) to substantiate the number of acres actually irrigated. (Exhibit I, p. 1, para. 2.) See also Exhibit J, BIA analysis, p.4, indicating that 32.8% of the claims reviewed by BIA were verified by DNRC using a single data source.) Under the new verification procedures, all irrigation claims would be verified employing two or more sources when available to check the acreage claimed. See Water Right Claims Examination Rules, Rule 2. VIII. (2). The USBR analysis states that reverification of Basin 41H would likely result in more information concerning claims, more resolution of claims before formal hearings, and a reduction in pretrial conferences previously required to determine issues related to objections. (Exhibit I, p. 1, para. 3.)

Based on their experience in investigating claimed rights, Forest Service personnel state that improved DNRC claims examination procedures would improve the accuracy of decreed rights. (Exhibit L, Rosquist affidavit, para. 2; Exhibit K, Russell affidavit, para. 9.) It should be emphasized that the Forest Service (or any other federal agency) is in no position to insure that all

suspect claims in this adjudication will be adequately verified. The Forest Service has only been able to investigate claims which might directly affect the National Forests, leaving many claims to be examined by DNRC or other parties. (Exhibit K, Russell affidavit, para. 9; Exhibit G, Wardensky affidavit, p. 2, last para.) Thus, large areas of most of the basins under temporary preliminary decree have not been subjected to the same level of scrutiny by the Forest Service which has resulted in the identification, reduction, and elimination of exaggerated or non-existent water claims Exhibit K, Russell affidavit, para. 8).

(2) *The Hydrometrics study indicates the necessity of re-examination of claims in some basins.* – Another indication of the need for re-examination by DNRC under the new procedures is a report prepared by Hydrometrics, a consulting firm in Helena, Montana.[6] The Hydrometrics report finds that there are many inaccurate and inflated claims in the temporary preliminary decrees for Basins 76K and 76E, and that DNRC did not conduct sufficient claims examination to ferret out inaccurate and inflated water use claims in those basins.

For example, in Basins 76K and 76E, there were a total of 29 sprinkler irrigation claims with a priority date earlier than 1936. These claims are facially suspect, since 1936 is the earliest date at which rural electrification would have made sprinkler irrigation feasible (Exhibit S, Hydrometrics report, p. 5-4). There is no indication in the

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[6] The report was produced for the law firm representing the Washington Water Power Company in the adjudication. WWPC provided an "Executive Summary" of the report to the Montana Supreme Court in *In re DNRC*, 740 P.2d 1096 (1987).

old DNRC Claim Verification Manual or verification abstracts that DNRC examined sprinkler irrigation claims to determine if the claimed acreages could, at the time of the claimed priority date, have been flood irrigated out of the claimed points of diversion, or whether a new use resulted from irrigation of more land than was originally flood irrigated. (See Exhibit S, Executive Summary of Hydrometrics report, pp. vii, ix.)

The Hydrometrics study also discloses that in the two basins examined, DNRC has conducted an insufficient number of field investigations to verify the accuracy of water rights claims. Of the 61 claims reviewed in Basin 76E, only two claims appear to have been field investigated before issuance of the temporary preliminary decree (Exhibit S, p. ix). In early 1986 DNRC stated that of the 70,000 claims that had been decreed in the adjudication process, only 20 field investigations had been performed. The report concludes that the lack of adequate field investigation is a major deficiency in verification and in resolution of objections (*id.*).

According to the Hydrometrics report, inadequate claims examination procedures resulted in the inclusion of inaccurate claims in temporary preliminary decrees. For example, of the 109 irrigation claims in Basin 76E with diversions equal to or greater than 2.5 c.f.s., 61 claims (56%) were decreed flow rates which exceed the standard flow rate of 17 gallons per minute per acre (Exhibit S, p. viii). In the same basin, two separate standards for irrigation water volumes were used. The old Water Court volume standards (implemented on November 12, 1982) were used in verification for the temporary preliminary decree. The new standards (implemented

October 19, 1984) were used to resolve some objections. The new standards for flood irrigation systems allow from 64% to 100% more water use than the old standards. Of the 109 irrigation claims with claimed diversions of 2.5 c.f.s. or greater, 26 (24%) were decreed volumes that exceed the new Water Court volume standard of 8.5 acre-feet per acre for Climatic Area IV for flood irrigation (*id.*).

The Hydrometrics study concluded that shortcomings in the claims examination process, among other problems, have reduced the reliability of the adjudication process and resulted in decrees with a questionable technical and factual basis (Exhibit S, p. 6-1).

The foregoing demonstrates that in at least some decreed basins, verification conducted to date has been insufficient. It is probable that this situation exists in other decreed basins as well. The best manner of ascertaining whether reverification is required in decreed basins is to permit DNRC, pursuant to the Stipulation, to issue comparison reports with respect to those basins.

b. *The state's own expert water resources agency has determined that there is a need for reverification in at least five undecreed basins.* – DNRC, in the comparison reports issued for Basins 40K, 43A, 40C, 41G, and 41C, had concluded in effect that the application of the Montana Supreme Court's claims examination rules to these basins which have already been completely or partly verified using the old verification manual would result in more accurate and defensible decrees of water rights (see Statement, *supra*, II. B. 2.). Perhaps the most important disclosure in these reports is the Department's view that application of the new rules would reveal "issues"

regarding claimed water rights (presumably including instances of inaccurate and inflated claims) which to date have not been uncovered under past verification procedures (see Exhibit Q, p. 3). The DNRC reports on these basins, without more, are sufficient ground for requiring reverification in those basins under the Montana Supreme Court's new rules.[7]

c. *The objection and hearing process is no substitute for adequate claims examination by DNRC.* – The Chief Water Judge has rejected requests for reverification based upon his view that the DNRC's claims examination functions under M.C.A. § 85-2-252 should not be regarded as a substitute for the objection and hearing process which follows the Department's verification activities. (See Exhibit T, letter from Chief Water Judge to John R. Hill, dated April 3, 1986.) The United States does not maintain that the DNRC should supplant the adjudicatory function of the Water Court. However, DNRC has a vital role to perform in the adjudication under the Montana Water Use Act, apart from the Water Court's adjudicatory functions. The department's important function is clear from M.C.A. § 85-2-243, which directs DNRC to inform and

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[7] Of the five basins for which DNRC has issued comparison reports, the Water Court has denied reverification in one – Basin 40C. (Exhibit R, Order filed October 19, 1987.) Basin 40C is an anomaly because the water court approved extensive claimant contact by DNRC in that Basin. This claimant contact resulted in claimants amending their claims and thereby increasing the accuracy of the decree. However, despite this claimant contact, DNRC should re-examine the claims in this Basin, because the new claims examination rules allow DNRC to investigate new issues.

assist the Water Court, subject to the Court's direction, as well as from § 85-2-231(1)(b), which specifies that the preliminary decree shall be based on, *inter alia*, "the data submitted by the department."

The DNRC's role of noting claims which that agency suspects are inaccurate or excessive permits the objection and hearing phases to be meaningful for the United States and other objectors.[8] The claims examination function of the DNRC is especially critical in light of the statutory presumption that water claims are *prima facie* valid. See M.C.A. § 85-2-227.

The United States is the largest single water claimant in the Montana adjudication, with over 32,000 water claims filed to date. In addition, in order to protect our extensive water rights for federal and Indian reservations, we have filed over 4,300 objections to claims listed in temporary preliminary decrees. Given the scope of the United States' water interests in the state, and the volume of its objections, the United States cannot be reasonably expected to investigate every water claim which might infringe on federal or Indian rights. The sheer number of filed claims and the size of many water basins creates an unmanageable situation for nearly all water users. Without DNRC assistance most water users, who usually appear *pro se*, will not have the resources to make

[8] Under the old verification procedures, DNRC noted "grey area remarks" to flag claims concerning which the agency's investigation had raised questions. Under the new claims examination rules, DNRC is to prepare a "summary report" which will encapsulate the results of its inquiry. (See new Claims Examination Rule 1. VI., and Exhibit A to rules.)

informed objections in the adjudication. DNRC performs a vital role in signalling to water users which claims are suspect and possibly worth challenging. In addition, the expertise of that agency is critical in providing information to the Water Court for use in all phases of the adjudication.[9]

(1) *The United States must rely on DNRC to a significant extent in the United States' efforts to protect its water interests in the adjudication.* – As a practical matter, the United States must rely to some extent on the claims examination functions of DNRC when the United States reviews temporary preliminary decrees to decide to which claims to object, and when the federal government attempts to resolve the objections.

For example, the Bureau of Reclamation has filed approximately 640 objections to claims in 12 basins which have reached the temporary preliminary or preliminary decree stage. Over 95% of those USBR objections were based on "grey area remarks" placed on inaccurate or unsubstantiated claims by DNRC as part of its verification process (Exhibit U, Pike affidavit, para. 2; Exhibit I, Pike affidavit, para. 2).

In addition, in USBR's experience, DNRC filed objections against most of the questionable or inaccurate

[9] By its position herein, the United States does not mean to suggest that DNRC's claims examination procedures should be applied to the water rights claims of the United States on behalf of federal and Indian reservations. (See Stipulation, para. 45, p. 18, which recites that the verification procedures resulting from the Stipulation are not intended to be applied to the reserved rights claims for Indian and other federal reservations.)

claims once those claims were included in the temporary preliminary decrees. USBR relied heavily upon DNRC participation in the adjudication process in resolving Bureau objections. Of the USBR objections for which hearings have been held, about 90% have been resolved through the claimants contacting DNRC to clarify or correct aspects of their claims which precipitated the grey area remarks, often resulting in significant changes to rights as decreed in the temporary preliminary decrees. (Exhibit U, para. 3.) USBR is not capable of performing claims examination functions which DNRC may not be able to provide in the future due to recent reductions in DNRC's budget (*id.*, para. 4).

BIA also relies on DNRC to a considerable extent in deciding which claims should be objected to and in pursuing objections. To date, BIA has filed 134 objections in Basin 41K (Sun River) and 701 objections in Basin 41H (Gallatin River). Due to time and personnel limitations, BIA filed its objections based primarily on verification information developed by DNRC (Exhibit V, Oellermann affidavit, para. 2-3.) If hearings are set on the BIA objections, BIA will not have the personnel to perform field investigations which may be needed, thus necessitating reliance on field checks by DNRC (*id.*, para. 4).

The fact that the Forest Service has successfully investigated and challenged numerous claims in the adjudication (as described in the Statement, *supra*, at II. B. 1. b. (2)) does not detract from the position asserted herein that to a considerable degree the United States must depend on the claims examination function of the DNRC. No party to the adjudication, including the United States, should be required to fulfill the DNRC's verification

duties as set out in the Montana Water Use Act. See M.C.A. §§ 85-2-243, 85-2-231 (1) (b).

In addition, the results achieved by the Forest Service have come at considerable cost in money and time. Over 200 Forest Service employees have been involved in reviewing temporary preliminary decrees, investigating claims and providing evidence since the first temporary preliminary decree was issued. (Exhibit K, Russell affidavit, para. 7.) This effort has cost the federal government in excess of one million dollars in direct cost (some of which is attributable to the Forest Service's own claims), not including management overhead (*id.*). This cost to the United States runs afoul of the intent of Congress in the McCarran Amendment that the United States should not shoulder a disproportionate portion of the costs of a general stream adjudication. See 43 U.S.C. 666(a), providing that "no judgment for costs shall be entered against the United States" in a proceeding under the statute.

No party to this adjudication besides the DNRC can provide the comprehensive and thorough claims examination which is required to render the adjudication adequate. As the Forest Service's Regional Hydrologist states, based on that agency's experience to date, it appears that in the absence of more effective and comprehensive DNRC verification procedures, numerous exaggerated or non-existent water rights will be finally decreed in the 46 additional basins involving Forest Service interests which remain to be adjudicated. This will be the case even if Forest Service participation remains at the present level. (Exhibit K, Russell affidavit, para. 9.)

Another reason that the Forest Service participation does not undermine our position that the DNRC's role is critical to the adequacy of the adjudication is that the other federal agencies with water interests in Montana (such as BIA, USBR, and the Fish and Wildlife Service) lack the resources of the Forest Service to document objections to claims. (Exhibit U, Pike affidavit; Exhibit V, Oellermann affidavit, para. 3-4.)

d. *Reductions in DNRC's budget may not excuse an inadequate adjudication.* – In support of limiting DNRC's claims examination activities in these proceedings, the Water Court has cited the recent cuts in DNRC's budget which restrict the agency's ability to verify claims. (See Exhibit N, Order dated August 6, 1987, pp. 2-3; Exhibit R, Order filed October 19, 1987, p. 7; see also Exhibit A, Montana Supreme Court Order Adopting Water Right Claim Examination Rules, p. 3.) These budgetary restrictions cannot justify an inadequate claims examination process. Under the "adequacy" standards of the McCarran Amendment, one arm of the state (the judiciary) may not excuse an inadequate adjudication by pointing to the failure of another arm (the legislature) to appropriate funds.[10] If Montana's adjudication falls short of the standard required by the United States Supreme Court,

[10] The conclusion stated in the text is especially true given that the Chief Water Judge, in a letter to Senator Peter R. Story dated February 18, 1987, opposed DNRC's attempts to resist the reduction in funding for DNRC's assistance to the Water Court (Exhibit W). The letter states that "[i]f the DNRC is not willing to work under the direction of the Water Court, then perhaps closing the purse strings is the only way to control the agency" (Exhibit W, p.3).

the United States should not be subject to the proceedings.

The recent cuts in the DNRC's budget threaten to place even more of the burden of identifying erroneous claims on federal agencies and other parties to the adjudication who are in no position to carry out this function. DNRC had announced that due to fiscal restrictions it is withdrawing approximately 85% of the objections to water right claims it has filed in the past several years. (Exhibit X, letter from Larry Fasbender to Judge Lessley dated July 7, 1987.) This partial removal of DNRC from the objection and hearing process will be detrimental to federal agencies' efforts to protect their water interests. (See, *e.g.*, Exhibit U, Pike affidavit, para. 4.)

The foregoing demonstrates that the adequacy standard of the McCarran Amendment requires the relief the United States seeks in the motion. Below, we demonstrate that state law supports the United States' motion as well.

B. *The DNRC in its Role as Expert Witness Should Be Permitted to Conduct Adequate Claims Examination.* – DNRC's role in this adjudication is akin to that of an expert witness. As the Montana Supreme Court has noted, under M.C.A. § 85-2-243, DNRC is to conduct field investigations and provide other information respecting water claims at the Water Court's request. In re DNRC, *supra*, 740 P.2d at 1101; Exhibit A, Order Adopting Water Right Claim Examination Rules, pp. 2-3. However, this does not mean that the Water Court may direct the

agency in the formulation of its expert conclusions concerning the verification of water claims.[11] As the Montana Supreme Court stated, DNRC has a "crucial role to be played * * * in the adjudication of water rights claims:"

> The technical expertise, assistance and information of the DNRC, which all sides recognize, is indispensable for the success of the adjudication process. A lack of departmental cooperation in the furnishing of such technical expertise, assistance or information could bring the judicial adjudication of water rights to a grinding halt.

In re DNRC, supra, 740 P.2d at 1102. This role of DNRC's is closely analogous to that of an expert witness pursuant to Montana Rules of Evidence 702-705. The value of DNRC's role as an expert is seriously compromised if the department is not permitted to conduct its investigations in a manner which it regards as professionally acceptable.

Indeed, the admissibility of DNRC's information is called into question if that data is, by the department's own admission, not based upon adequate verification, including field investigation if needed. See, *e.g., State Highway Commission v. Antonioli,* 145 Mont. 411, 401 P.2d 563 (1965) (expert testimony regarding value of mining claim inadmissible for lack of foundation, where there were no core drilling, surface or subsurface sampling, geological reconnaissance and other studies); *State Highway Commission v. Palin,* 160 Mont. 486, 503 P.2d 524

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[11] Compare Water Right Claims Examination Rules, Rule 1. I. (2), which provides in part: "The water court determines the necessity and scope of any preliminary Department examination as set out in these rules, but in no way influences the results of the directed examination."

(1972) (expert testimony on value of grazing land inadmissible, where witness' assumption as to carrying capacity of land was not based on any actual information concerning amount of income which could have been derived from the land).

It may be prejudicial error to permit an expert to testify concerning a matter on which the witness states he has inadequate information. *Cf. State Highway Commission v. Metcalf,* 160 Mont. 164, 500 P.2d 951 (1972) (error to permit witness to express opinion on value of gypsum deposit, where witness stated he was unable to testify as to fair market value of deposit). A trial court's improper restriction of expert testimony may also constitute reversible error. See, *e.g., Hunsaker v. Bozeman Deaconess Foundation,* 179 Mont. 305, 588 P.2d 493 (1978).

In these proceedings, in order for DNRC to perform its expert claims examination functions in a professionally adequate manner, the agency should be permitted to issue comparison reports on decreed basins and to reverify claims in basins which, on the basis of comparison reports, require re-examination.[12]

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[12] It is instructive to compare DNRC's operations in the Montana water proceedings to the investigatory activities of the Arizona Department of Water Resources (DWR) in the Gila River drainage adjudication. In *United States v. Superior Court, County of Maricopa,* 697 P.2d 658 (1985), the Arizona Supreme Court held that DWR's role in the proceedings did not violate standards of procedural due process.

The functions of DWR in the adjudication are set out in A.R.S. §§ 45-253, 45-255, 45-256. The DWR assists the proceedings by, among other actions, helping to determine the geographical scope of the adjudication, and providing the court or

C. *The Stipulation Requires DNRC to Prepare Comparison Reports for Previously Decreed Basins.* – As noted in the Statement, *supra*, at II. A., the United States and other parties to this adjudication entered into an agreement with the Water Court which was designed to address, among other issues, verification problems which had arisen under the old verification manual. The Stipulation specifically addressed the matter of decreed basins which had been verified under the old procedures, by providing in para. 30 that the DNRC was to produce reports comparing the effects of applying the old verification procedures with the effects of using the "verification procedures adopted pursuant to this Stipulation." On the basis of these comparison reports, DNRC or other interested persons could then move the Water Court to order DNRC to apply the new procedures to any such basin.

Thus, the comparison report process is a key step in permitting parties such as the United States to learn if

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master with "technical assistance" on subjects "with respect to which the [DWR] possesses hydrological or other expertise." A.R.S. § 45-256(A). "Technical assistance" includes identifying hydrological boundaries and potential claimants, locating and obtaining records, conducting a "general investigation" or examination of the river system and source, investigating and examining facts pertaining to claims, preparing maps and plats, gathering such other information "as may be necessary or desirable," and reporting to the court or master. Under A.R.S. § 45-256(B), the technical assistance rendered by DWR is to be set forth "on a claim by claim basis." See *Maricopa County, supra*, 697 P.2d at 672. The Arizona statute recognizes that the parties to a comprehensive general water adjudication cannot be expected to perform the expert function of the state's water resources agency.

there is a need for re-examination in a decreed basin, and in obtaining reverification if necessary. Under para. 47 of the Stipulation, the United States reserved the right "to take appropriate legal action to enforce the terms of this Stipulation or to ensure that accurate and legally defensible decrees will be issued." Pursuant to para. 47, the United States has moved for enforcement of the comparison report provisions of the Stipulation.

Although the Stipulation was not formally entered by the Montana Supreme Court as a consent decree, it was agreed to by the parties as a condition to dismissal of the petitions under Montana R. App. Civ. P. 36. For this reason, the Stipulation should be enforced under principles of contract law. In consideration for the United States and DFWP agreeing to move to dismiss their petitions regarding procedural issues, the Water Court agreed to certain procedural revisions, including the comparison report process of para. 30. (See Stipulation, pp. 1-3, 17-19.) Thus, there were mutual promises made which constitute valid consideration under Montana law. *Rudio v. Yellowstone Merchandising Corp.*, 652 P.2d 1163 (1982); *Miller v. Titeca*, 628 P.2d 670 (1981). The United States fulfilled its side of the bargain by moving on March 20, 1986, to dismiss its petition for a writ of supervisory control on the basis of the agreement. Thus, the Water Court should comply with comparison report procedure set forth in the agreement. *Smith v. Zepp*, 173 Mont. 358, 567 P.2d 923 (1977) (where party to contract obligates himself to legal and possible performance, he must perform in accordance with contract terms).

The Stipulation is presently in effect and binds the Water Court, at least with respect to those parts of the

agreement which do not violate the Montana Water Use Act. Although the Water Court may take the view that there was no "meeting of the minds" respecting some of the agreement's particulars, the fact remains that the Water Court accepted the procedures outlined in the Stipulation, without exception (Stipulation, para. 3, p. 3),[13] and signed the agreement. One who executes a written contract is presumed to know the contents of the contract and assent to its specified terms, in the absence of fraud, misrepresentation, or other wrongful act by other contracting parties. *Quinn v. Briggs*, 172 Mont. 468, 565 P.2d 297 (1977). See also *Ryan v. Ald, Inc.*, 143 Mont. 367, 427 P.2d 53 (1967). If reasonably practicable, every part of a contract must be given effect so as to make its terms operative. *Bender v. Rookhuizen*, 685 P.2d 343 (1984); *Lewis v. Murphy*, 649 P.2d 740 (1982); *Guidici v. Minerals Engineering Co.*, 136 Mont. 389, 348 P.2d 354 (1960).

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[13] Paragraph 3 of the Stipulation reads:

> The purpose of this Stipulation is to expeditiously resolve the differences between the parties while conserving the resources of the parties and the Montana Supreme Court. The issues raised in the petitions filed by [DFWP], Esther McDonald, *et al.*, and the United States of America have been divided into substantive and procedural issues. The parties and amici have recommended a process for resolving the substantive legal questions in the most expeditious manner possible. *Where procedural issues are involved, the parties and amici have recommended changes in Water Court procedures and policies that constitute a settlement of the procedural matters in dispute or have recommended a process for resolving the procedural issues. The Water Court has accepted the recomendations.* [Emphasis supplied.]

The Montana Supreme Court has, at least on one occasion, recognized that the Stipulation is effective even though it has never been formally "accepted" by that Court. In *In re DNRC, supra*, 740 P.2d at 1104, the Montana Supreme Court, relying on the Stipulation, rejected DNRC's contention that the Water Court was engaging in an improper incursion by the judiciary on the executive powers of the department.

Specifically, the Court adverted to para. 26 of the agreement, which sets out a framework for cooperation between the Water Court and DNRC on the subject of verification, and which specifically provides that "[t]he water court shall refrain from participating in the verification of claims by DNRC, except the water court, upon proper application and for good cause shown, may enjoin DNRC from acting beyond its jurisdiction in the verification process." *In re DNRC, supra*, 740 P.2d at 1104. The Montana Supreme Court concluded that "[t]he language of the foregoing stipulation, acceded to by the chief judge of the water court, belies any intention of the water court to override or control the day to day operations of the DNRC." *Id.* Thus, even though the Supreme Court has not expressly approved the Stipulation, it obviously regards it as in effect for at least some purposes.

The arguments against the effectiveness of the comparison report provisions of the Stipulation are not persuasive. In its Order Adopting Water Right Claim Examination Rules of July 7, 1987, the Montana Supreme Court may have cast some doubt on the binding nature of the Stipulation when it stated that "[t]he statutory power of the water judges to direct the process of adjudication [under M.C.A. § 85-2-243] should not and cannot be

stipulated away." (See Exhibit A, Order, p. 3.) This statement does not contradict the United States' position that the Water Court should comply with the comparison report provisions of the Stipulation, chiefly para. 30. In para. 30, the Water Court *exercised* its statutory power to direct the adjudication by agreeing to a framework for comparing the application of the old verification rules with the new procedures in decreed basins. Having made this commitment, the Water Court is bound. To hold otherwise would render the Stipulation a futile gesture.

It might be contended that the new claims examination rules were not "adopted pursuant to [the] Stipulation,"[14] and therefore the provisions of the Stipulation dealing with comparison reports do not apply to those rules. However, this argument overlooks the fact that the claims examination rules ultimately adopted by the Supreme Court originated with the procedures drafted by the DNRC pursuant to the Stipulation. In fact, the Montana Supreme Court in its order promulgating the new rules remarked that it was adopting "practically without amendment or deletion" the rules suggested by DNRC for the department's processing of water claims. (Exhibit A, Order, pp. 3-4.) Therefore, the new claims examination rules should be deemed to have been adopted pursuant to the Stipulation for purposes of effectuating the intent of para. 30 of the agreement. An agreement should be interpreted such that the intentions of the parties are

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[14] Paragraph 30 of the Stipulation recites that DNRC shall file reports with the Water Court "comparing the previous verification procedures *with the verification procedures adopted pursuant to this Stipulation.*" (Emphasis added.)

given effect and such that the contract will be lawful, operative and definite. *Foster v. Realty Title Co.*, Inc., 680 P.2d 323 (1984); *Downs v. Smuk*, 185 Mont. 16, 604 P.2d 307 (1979); *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 600 P.2d 163 (1979).

The foregoing shows that the comparison report provisions of the Stipulation are in effect and should therefore be followed by the Water Court. At a minimum, the Water Court has a moral obligation to act in a manner consistent with that part of the agreement. If the Water Court believes that those provisions are a dead letter, the United States requests that the Court enter a ruling to this effect in order that the United States and other affected parties may pursue whatever remedies are available to them.[15] Otherwise, the parties and the Water Court will continue to wallow in uncertainty concerning what guidance, if any, the Stipulation affords to the parties in contending with the complex issues raised by this adjudication.

IV. CONCLUSION

Both the McCarran Amendment and state law support the request for relief in the United States' motion. There are compelling indications that, in at least some

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[15] Since the petitions for writs of supervisory control are still pending before the Montana Supreme Court, one remedy open to the United States is to reopen the proceedings in that Court in the United States' action (No. 85-493) and obtain a decision from that Court regarding such questions as the effectiveness of the Stipulation and the other issues raised in this brief.

basins which have been partially or completely verified using the old verification manual, there is a real need for reverification using the new claims examination rules.

We recognize that the new claims examination rules themselves may be changed in significant respects in the near future. The Montana Supreme Court, in issuing the new rules, declared that their adoption shall be deemed temporary until the further order of that Court, but shall govern from July 15, 1987, the practice and procedure respecting water claims examinations before the Water Court and DNRC, unless otherwise amended or modified by the Supreme Court. (Exhibit A, Order, p. 5.) The Supreme Court gave interested parties until March 15, 1988, in which to comment respecting the operation or effectiveness of the new rules.

The United States may comment critically on some aspects of the new rules by the March 15, 1988 deadline. Therefore, the United States' request for reverification under the new rules is not intended as a blanket endorsement of those procedures.[16] However, we believe that the new claims examination procedures are in general more likely to result inadequate decrees than the old rules were. For this reason, we have made our motion. In light of the fact that the new rules may be substantially modified in the near future, the Water Court may wish to consider delaying reverification under the new procedures until they have become finalized.

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[16] Nor should the United States be understood, through this motion and brief, to signal its approval of the Water Court practice of routinely issuing temporary preliminary decrees.

For the reasons set forth above, the United States requests that:

1. The Water Court order the DNRC to issue comparison reports for basins which are covered by temporary preliminary decrees or preliminary decrees, in accordance with para. 30 of the Stipulation. In order for the comparison reports to be useful to interested parties, the Water Court or DNRC should give all interested parties adequate notice of the availability of the reports.

2. The Water Court order DNRC to reverify, using the new claims examination rules, those basins in which, according to DNRC reports, the application of the new rules would result in more accurate decrees, specifically Basins 40K, 43A, 40C, 41G, and 41C.

DATED this 21st day of December, 1987.

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